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Report on a Review of United States Assistance to Peruvian Counter-Drug Air Interdiction Efforts and the Shootdown of a Civilian Aircraft on April 20, 2001

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BACKGROUND

On the morning of April 20, 2001, a Peruvian Air Force A–37 fighter engaged in counter-drug operations over northeastern Peru fired on and disabled a suspected drug trafficking aircraft. The single engine float plane actually was owned and operated by the Association of Baptists for World Evangelism and was carrying missionaries returning to their homes in Iquitos, Peru. One of the missionaries, Veronica Bowers, and her infant daughter Charity were killed by the gunfire. A bullet also hit the pilot, Kevin Dondaldson, shattering two bones in his leg. Mrs. Bowers' husband Jim and son Cory survived the attack. The damaged float plane made an emergency landing on the Amazon River about 80 miles from Iquitos, Peru. The missionary's plane had been tracked by a Cessna Citation owned by the U.S. military and operated by the U.S. Central Intelligence Agency (CIA) as part of a bi-national drug interdiction program.

NATURE OF THE INTELLIGENCE COMMITTEE'S REVIEW

The Committee has held one closed hearing and a closed briefing concerning the Peru shootdown. On April 24, 2001, the Committee heard testimony from George Tenet, Director of Central Intelligence. Director Tenet was accompanied by the Chief of the CIA's Latin American Division and the Chief of the CIA's Military and Special Programs Division. On May 10, Committee members and staff met to view the videotape and transcript of the shootdown and were briefed by CIA officials. On July 26, the Committee staff received an on-the-record briefing from Assistant Secretary of State Rand Beers who summarized the results of the joint American-Peruvian investigation of the shootdown.

Committee staff conducted interviews with executives and personnel from: the CIA, the Department of State, the Department of Defense, the Customs Service, the Drug Enforcement Administration, the Office of National Drug Control Policy (ONDCP), the Peruvian Air Force, Peru's aeronautical agency and the Association of Baptists for World Evangelism (ABWE). Individuals interviewed included: the American crew of the Citation tracker aircraft, Mr. Kevin Donaldson and Mr. James Bowers, and ground personnel in Peru. The Peruvian authorities did not permit Committee staff to interview the host nation rider, the interceptor pilots, the Peruvian Officer in Charge on the day of shootdown, or the Commanding General of the Peruvian Air Force Sixth Territorial Air Region who authorized the shootdown. The Peruvians denied the interview request because there are pending judicial proceedings against the Peruvian pilots and the host nation rider. The Peruvians had made all of the officers available to the joint Peruvian/American investigation team. In order to complete their interviews and review of relevant evidence, Committee staff traveled to the headquarters of

both the U.S. Southern Command and the Joint Interagency Task Force East (JIATF–E), the Peruvian cities of Lima, Pulcallpa, and Iquitos and to ABWE Headquarters in Harrisburg, Pa.

The Committee made oral and written requests to the agencies named above for information relevant to the inquiry. Committee staff has been able to review substantial material provided by the CIA and smaller but significant amounts of material provided by the Department of State, the Department of Defense and the ONDCP.

The Committee owes a particular debt of gratitude to Mr. Bowers and Mr. Donaldson for their willingness to meet with Committee staff and review the events leading up to the April 20 tragedy. These two individuals suffered a loss of incomprehensible magnitude, yet they recounted the events with clarity and precision making an invaluable contribution to the Committee's understanding of this terrible episode. Without their cooperation the Committee's work would have been incomplete.

HISTORY OF THE PROGRAM

The United States runs a large and multi-pronged counter-drug program in Peru. According to officials at the U.S. Embassy the program is based on four pillars—interdiction, eradication, alternative development, and demand reduction. Most, if not all sections of the Embassy contribute to this effort. The Drug Enforcement Agency has primary responsibility for interdiction efforts through its liaison relationship with the Peruvian National Police. The State Department Narcotics Affairs Section supports Peruvian manual eradication efforts while the Agency for International Development focuses on alternative development. Various elements of the U.S. military also provide support to the interdiction effort through training and materiel support. This includes efforts to upgrade the Peruvian military's interdiction capabilities.[1]

Throughout the cocaine epidemic of the 1980s and into the early 1990s Peru was the largest producer of coca leaf, the raw material for cocaine, in the world. In 1992, Peruvian cultivation peaked at 129,100 hectares and accounted for 61 percent of the world's coca.[2] Traditionally the coca leaf was refined into cocaine base in Peru before being transported to Colombia for final processing and shipment to the world's markets, primarily the United States. Given the remoteness of the coca growing areas in the Peruvian jungle and the lack of transportation infrastructure, smuggling by air was the preferred method of moving the cocaine base. It was this air bridge between Peru and Colombia that was the focus of the joint Peruvian/U.S. air interdiction effort.

Since the early 1990s the U.S. Southern Command has operated ground based radars in Peru to assist the Peruvian Air Force in monitoring its air space and identifying possible drug trafficking flights. The Southern Command also has flown radar surveillance flights in Peru, although those have been dramatically reduced in recent years. U.S. military support to Peru's interdiction effort at first concentrated on finding clandestine airstrips in the primary

[1] SSCI staff interviews with U.S. Embassy Country Team, Lima, Peru, 6/21/01.
[2] ONDCP Table 1: Net Coca Cultivation, 7/20/01.

coca growing region of the Upper Huallaga Valley. The early program had some success at altering trafficking patterns forcing the traffickers to fly at night, disperse their processing labs, and shift more operations away from the Upper Huallaga Valley.

In 1993 President Clinton issued Presidential Decision Directive 14 shifting the focus of U.S. counter-drug efforts from the transit zone in the Caribbean Sea and Gulf of Mexico to the source zone, chiefly Colombia, Peru and Bolivia. The United States stepped up its assistance in 1993 just as the Government of Peru was implementing Peruvian Decree Law Number 25426 which contemplated the use of deadly force against aircraft engaged in drug trafficking. In the spring of 1994 the Government of Colombia announced that it would also implement a policy of using deadly force against aircraft suspected of drug smuggling. Colombia took this step despite a 1990 warning from the United States that use of U.S. intelligence to effect a shootdown could result in the suspension of assistance.

Lawyers at the Departments of Defense, State and Justice became increasingly concerned about U.S. criminal liability under the Aircraft Sabotage Act of 1984. Specifically, the Act targets the use of deadly force by foreign governmental agents against civil aircraft in flight which are suspected of transporting illegal drugs. The lawyers believed that there was a substantial risk that agents of the U.S. Government (officers and employees), who were providing intelligence support to foreign interdiction programs which conducted shootdowns, could be subject to criminal liability for aiding and abetting criminal violations of the Act. Consequently, on May 1, 1994, the Department of Defense suspended intelligence sharing programs with Peru and Colombia. An interagency working group of lawyers from the Departments of State, Justice, Defense, Treasury and Transportation determined that U.S. support to those interdiction programs was likely unlawful and that support should remain suspended pending a thorough review of the legal questions.

In July 1994, the Department of Justice Office of Legal Counsel prepared a memorandum (Annex A) for Deputy Attorney General Jamie Gorelick concluding that the Aircraft Sabotage Act of 1984 applied to the police and military personnel of foreign governments. The Office of Legal Counsel opined further that there was a substantial risk that U.S. Government personnel who provided assistance to a foreign government's aerial interdiction program would be aiding and abetting the violation of that Act.[3]

The Executive branch undertook an interagency review to formulate a legislative remedy to this problem. According to interviews with a variety of participants the Department of Defense, the Central Intelligence Agency and the Department of State wanted to find a way to resume U.S. assistance, particularly intelligence sharing which had proven effective against the illegal drug trade. The Department of Justice was neutral. The legislative proposal was crafted with input from the Office of National Drug Control Policy and the National Security Council staff. The Department of Transportation opposed the legislation because of concerns about the safety of civilian aircraft. President Clinton ultimately decided

[3] Annex A.

to go forward and indicated support for legislative language correcting the problem.

On July 1, 1994, the U.S. Senate adopted an amendment to the National Defense Authorization Act for Fiscal Year 1995 (Annex B). The amendment provided relief from the Aircraft Sabotage Act of 1984 after a determination from the President of the United States that drug trafficking posed an extraordinary threat to the national security of a country, and that the country had appropriate procedures in place to protect against the innocent loss of life. The legislation did not further define what constituted appropriate procedures. During the floor debate, however, Senators made it clear that those procedures should include extensive efforts to make contact with a suspect aircraft including visual signals and warning shots and would be applied in limited areas with sufficient notice to airmen given in those areas.[4]

The legislation was signed into law on October 5, 1994. Section 1012 waived other provisions of law pertaining to a foreign country's actions against aircraft in that country's airspace if the President determined:

> (1) that such actions are necessary because of the extraordinary threat posed by drug trafficking to the national security of that country, and
>
> (2) that the country has appropriate procedures in place to protect against innocent loss of life in the air and on the ground, which at a minimum include effective means to identify and warn aircraft prior to the use of force.

Section 1012 also made it lawful for U.S. Government agents to provide assistance to a country engaged in actions against drug trafficking planes if the President had made those determinations. On December 1, 1994, President Clinton determined that Colombia had met the requirements set out in the law (Determination of President No. 95–9). The Determination for Peru followed on December 8, 1994 (Annex C).

The Determination for Peru was supported by a Memorandum of Justification (Annex D) that detailed the procedures that the Government of Peru had established to ensure against the loss of innocent life. Those procedures were based on International Civil Aviation Organization (ICAO) guidelines and codified in Peruvian law 24882. The Memorandum listed the four phases of Peru's air interdiction procedures—Detection, Identification, Intercept, and Use of Weapons. The Identification phase included determining whether the suspect aircraft was on a previously filed flight plan and attempting to establish radio contact with that plane. In the Intercept phase the Peruvians could launch interceptor aircraft that would attempt to identify the suspect aircraft, verify its registry, attempt to establish radio contact, and, if necessary, cause the plane to land "using intercept procedures consistent with International Civil Aviation Organization guidelines."[5] The final phase, Use of Weapons, began only with the permission of the Commanding General of the Peruvian Air Force Sixth Territorial Air

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[4] Congressional Record, Proceedings and Debates of the 103d Congress, Second Session, Volume 140—Part II, pp. 15584–15587.

[5] Annex D p. 3.

Region (VI RAT) or his Chief of Staff. In this phase the interceptor could be ordered to fire warning shots and if those were ignored the pilot could obtain permission from the Commanding General again before firing to disable the aircraft.[6] Based on the Presidential Determination the U.S. resumed assistance to Peru, including intelligence sharing, in March 1995. This effort became known as the "air bridge denial program."

Various U.S. Government agencies have had a role in the air interdiction program. Under Title 10 of the United States Code, the Department of Defense is the lead agency in detecting and monitoring drug trafficking aircraft overseas. The U.S. Southern Command has primary responsibility for military operations in the region and uses the Joint Interagency Task Force-East (JIATF–E) in Key West to direct air assets involved in drug interdiction efforts. Prior to the closure of U.S. military bases in Panama, operations in the source zone were controlled by the Joint Interagency Task Force-South. JIATF–E absorbed that function when the headquarters of U.S. Southern Command was moved to Miami.

The U.S. Southern Command controls a variety of military assets which assist in drug interdiction efforts. U.S. Air Force AWACS, U.S. Navy P–3 Orion and E2–C Hawkeye radar aircraft provide wide area coverage of airplanes operating throughout the region. U.S. Navy ships patrolling in the Caribbean and Pacific track both planes and boats in the transit zone. In addition to U.S. Air Force and Navy aircraft and ships, JIATF–E coordinates U.S. Coast Guard and Customs Service assets as well. Through JIATF–E, the U.S. Southern Command can communicate with the U.S. Citation tracker aircraft, monitor operational communications, and can make recommendations on where to operate. JIATF–E does not, however, have operational control of the Citation.

Another subcomponent of the U.S. Southern Command, the Joint Southern Surveillance Reconnaissance Operations Center (JSSROC), also in Key West, operates and maintains the network of ground-based radars in the region. JIATF–E and JSSROC are connected directly to the Peruvian military via computer links. Through this link the U.S. provides the Peruvians a display of air traffic in the region enabling both the United States and Peru to identify suspect aircraft.

The Department of Defense became involved in the counter-drug air-to-air tracker program in 1993. The Defense Appropriations Act that year included $35 million to lease T–47 trainer aircraft from the Navy to be used in the counter-drug effort. By 1995 the Department of Defense had not entered into a leasing agreement and the Defense Appropriations Act authorized the Department of Defense to purchase instead of lease the T–47 aircraft. During that year, the T–47 aircraft were destroyed in a hangar fire. The Department of Defense decided to use the funding to purchase five Cessna Citation aircraft for use in counter-drug operations. The legislative language did not specify that the planes were to be used in the air bridge denial effort specifically, only that they be used for counter-drug efforts.

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[6] Annex D p. 3.

Because the Peruvians do not have air-to-air radar capabilities, the Department of Defense determined that the Citations could best be used as tracker aircraft to assist in the air bridge denial program. Prior to receipt of the planes, the Department of Defense consulted with the various agencies participating in the counter-drug effort to determine the proper operator for these aircraft. A number of factors were considered including willingness to train and operate with the host nation in Peru; the ability to operate from rudimentary bases within the host nation; the capability to operate around-the-clock, throughout the year; the size of the logistical and security structure needed to support the operation (the "footprint"); and, the willingness to operate in difficult living conditions. The Department of Defense determined that a U.S. military operation would both carry too large a footprint and have security concerns other operators would not. The Air National Guard estimated a cost of $15–20 million a year to run the program, and would only commit their pilots to two week rotations, with the plane returning to the U.S. on a regular basis. At the time, the National Guard ran the ground-based radars in Peru, but required their personnel to be rotated out every 30 days. Currently, contractors run the radars. Other agencies either could not meet the mission requirements or could not do the mission efficiently and economically. Accordingly, the Department of Defense approached the CIA. The two agencies entered into a Memorandum of Agreement in 1997 concerning use of the Citations and management of the program.

The Department of Defense views the relationship with the CIA as similar to a contractor relationship. The Department of Defense provides funding and policy guidance while CIA performs the mission. The CIA provides the Department of Defense with cost-accounting information, and data concerning missions and hours flown by the Citation aircraft. The Department of Defense has continued to fund maintenance and upgrades to the Citations. The Department of Defense also has worked with the CIA to provide a search and rescue capability and infrastructure improvements.

The U.S. Customs Service also is deeply involved in counter-drug air interdiction operations. While it now works primarily in the transit zone, the Customs Service has at times worked with the Peruvian and Colombian air bridge denial efforts. The Customs Service first flew P–3 radar aircraft out of Ecuador in 1992. Depending on the area of operation these flights always had a Peruvian, Ecuadorian, or Colombian officer and a bilingual U.S. Air Force officer on board. In 1995, the Customs Service deployed a Citation to Peru to support the air bridge denial program. The Citation would deploy for 30 days spending two weeks in Peru and two weeks in either Colombia or Venezuela. The Customs' Citations operated with a bilingual host nation rider exactly as the CIA program does. For a variety of reasons, including operational constraints and the CIA's acquisition of the five Citations, the Customs Service withdrew from the Peruvian program in March 1998.[7]

[7] SSCI staff interviews with U.S. Customs Service officials, 6/6/01.

PROGRAM RESULTS

The air bridge denial program unquestionably was successful in contributing to a reduction in coca cultivation and cocaine production in Peru. That alone is a noteworthy contribution. The larger question of whether the U.S. policy of supporting air interdiction efforts has had an effect on reducing overall cocaine production is much more difficult to answer. While coca cultivation has dropped precipitously in Peru since 1995, Colombia has experienced an almost commensurate rise in coca growing despite pursuing a similar air bridge denial program. During the same period, Bolivia's decreased production was accomplished without any air interdiction program at all.

The air bridge denial program sought to deter narcotics trafficking in Peru by increasing the risk of transporting cocaine products by air. Narcotics traffickers prefer air transport due to the poorly developed road system in the coca growing regions in Peru, because navigable rivers do not flow north toward processing facilities in Colombia and ultimately the U.S. market, and because of the speed afforded by aircraft. In 1995 the air bridge denial program experienced immediate success in interdicting drug trafficking flights (see TABLE 1). The subsequent drop-off in endgames, only two from 1998 through 2000, should not be interpreted as a lack of effectiveness. Indeed, the data suggests the program has continued to have a deterrent effect on narcotics traffickers. An April 2000 study entitled Deterrence Effects and Peru's Force-Down/Shoot-Down Policy: Lessons Learned for Counter-Cocaine Interdiction Operations, conducted by the Institute for Defense Analysis for the Department of Defense, concluded that sustained interdiction rates of seven to twelve percent of the trafficking flights in Peru continue to deter air trafficking to less than ten percent of its pre-1995 levels.

Drug traffickers continue to fly cocaine and cocaine base out of Peru, but have changed their routes to escape detection and interdiction. While previously most trafficking flights were long in both distance and duration, the current pattern of illegal drug flights suggest a move to airfields close to the border with Brazil. From these areas, trafficking flights to Brazil are difficult to detect and interdict because the planes are aloft over Peruvian airspace for such short times and distances. Other analysis of air surveillance data and other information suggests that, although drug traffickers continue to fly out of Peru, the number of such flights has decreased and the volume of cocaine smuggled by air has dropped as well.

The ultimate goal of the air bridge denial program was to reduce the amount of coca grown and cocaine produced. In Peru the program, coupled with other counter-drug efforts, effected a significant reduction in coca cultivation. As the air bridge became too risky the coca growers and first stage processors lost their primary means of bringing cocaine base to market. The sudden loss of transportation led to a glut of supply in Peru and an abrupt drop in the price of unrefined coca leaf in Peru. Within a short time the price of coca leaf fell below the break-even point and coca farmers began to abandon their fields. The trend was reinforced when the Govern-

ment of Peru began manual eradication efforts in 1996. Removing the economic incentive for growing coca paved the way for more effective alternative development programs, further solidifying the shift away from coca.

While the air bridge denial program has had significant success in contributing to a reduction in coca cultivation in Peru, the effect of the air bridge denial policy on overall coca cultivation is not as clear. As TABLE 2 indicates, coca cultivation in Peru has decreased from an estimated 115,300 hectares in 1995 to less than 35,000 hectares in 2000. However, the results of counter-narcotics efforts in Colombia and Bolivia during this same period raise questions about the overall effectiveness of the air bridge denial policy in decreasing cocaine production in the region. Between 1995 and 2000, Colombia experienced a substantial increase in coca cultivation, from just under 51,000 hectares to over 135,000 hectares. This increase in coca production occurred despite Colombia instituting a similar air bridge denial program with U.S. assistance. Meanwhile, Bolivia chose not to implement an air interdiction policy and instead instituted an aggressive forced eradication program supported by alternative development. Bolivia was able to reduce coca cultivation to less than a third of its previous size, from 48,600 hectares in 1995 to less than 15,000 hectares in 2000.

TABLE 1.—PERUVIAN AIRBRIDGE DENIAL PROGRAM ENDGAMES 1995–2000 [8]

Year	Shootdown	Forcedown	Ground Action	Confirmed Fatality
2000	1	0	1	1
1999	0	0	0	0
1998	0	0	0	0
1997	5	0	5	2
1996	1	1	1	0
1995	7	4	4	0

Total shootdowns = 14
Total forcedowns = 5
Total ground actions = 11
Fatalities = 3 confirmed

TABLE 2—NET COCA CULTIVATION
[1992–2000]

CY	Bolivia	Peru	Colombia	SUM
1992	45,500	129,100	37,100	211,700
1993	47,200	108,800	39,700	195,700
1994	48,100	108,600	45,000	201,700
1995	48,600	115,300	50,900	214,800
1996	48,100	94,400	67,200	209700
1997	45,800	68,800	79,500	194,100
1998	38,000	51,000	101,800	190,800
1999	21,800	38,700	122,500	183,000
2000	14,600	34,200	136,200	185,000

Source: Office of National Drug Control Policy.

[8] TABLE 1 includes only endgames conducted with assistance of the CIA operated tracker aircraft. The Peruvian Government has claimed more than 38 shootdowns or forcedowns since 1995. (Source: CIA)

REVIEW OF THE AIR INTERDICTION PROGRAM AND PROCEDURES

Both the Administration and Congress in 1994 realized that there was a possibility that the Peruvian air interdiction program would use lethal force against an innocent plane not involved in narcotics trafficking. This understanding was the impetus behind the legislation providing for continuation of U.S. involvement in this program. However, explicit in that provision and in the ensuing Presidential Determination permitting resumption of assistance was the requirement that procedures to minimize the likelihood of the loss of innocent lives would be put in place, remain a primary concern, and be stringently followed by the Americans and Peruvians implementing the program.

The makeup of the aircrews and the backgrounds of the participants are critical components in understanding how these air interdiction operations are conducted and how procedures are implemented. During a typical mission, the Citation is manned by a U.S. pilot, co-pilot, and systems operator, as well as a host nation rider from the Peruvian Air Force. When the U.S. crews deploy to Peru they also include a mechanic and an avionics technician. Most of the pilots and sensor operators are former U.S. military personnel, although civilian pilots with significant experience also are employed. The CIA crews serve 30 day tours in-country. The crews receive an intensive two week crash course in Spanish. They operate, however, under the premise that the Peruvian host nation rider speaks English. Other U.S. personnel involved in the program include an Officer-In-Charge, (OIC) who is co-located with the VI RAT Headquarters in Pucallpa, Peru, and a team of active duty U.S. military personnel who provide communications support to the Peruvians and Americans. The OIC is responsible for managing the operation of the Citation and its crew.

The Peruvian Air Force provides officers to serve on the Citation who are responsible for relaying communications to the fighter aircraft. These officers, known as host nation riders, are majors or lieutenant colonels who are usually ground control radar officers. In addition to relaying orders to the fighter pilots, the host nation riders communicate with VI RAT headquarters for authority to proceed with various phases of an intercept operation. This individual is the one crew member who is expected to be bilingual. In interviews, the American crews who have worked with the host nation riders rated their English from poor to good. The crews indicated further that if a host nation rider did not possess adequate language skills, American officials could request that the individual be removed from the program.[9] In the early days of the program the U.S. program managers would interview the host nation riders and test them for English proficiency, but this practice lapsed overtime. The average deployment for a host nation rider is two weeks. One reason for the frequent rotation is to try to minimize the potential for corruption.

The two countries maintain parallel chains-of-command, one American and one Peruvian. The U.S. OIC in Pucallpa controls the mission for the Americans and sends his orders to the U.S. crew flying and operating the on-board air-to-air radar equipment on

[9] SSCI staff interviews with U.S. aircrew, 6/12/01.

board the Citation. The Citation's mission is to locate the suspect aircraft, and then vector and escort the interceptors to the target. The Peruvian chain-of-command is centered on the Peruvian host nation rider on board the Citation. The host nation rider is responsible for communicating with the fighter aircraft and requesting authorizations to proceed with intercept operations from the Peruvian OIC who controls air operations from VI RAT Headquarters. If the host nation rider determines the use of lethal force is necessary in an intercept operation, authorization must come from the Commanding General of the VI RAT, or in his absence, the Chief of Staff.

The dual chains-of-command remove U.S. personnel from the decision-making process related to a shootdown in Peruvian airspace. Only the Peruvians have the authority to order and execute a shootdown. This arrangement is embodied in the 1994 Memorandum of Justification supporting the Presidential Determination regarding Peru. That document assigns the United States and Peru joint responsibility for detection and monitoring of suspect aircraft, but makes it clear that subsequent actions, including the use of weapons, are controlled by the Peruvian Air Force.[10]

The two countries share a common communications system during the conduct of an air intercept. The host nation rider uses the same frequency to communicate with his command authority as the U.S. pilots. This frequency is also used by a large number of other operators throughout the Andean region, which makes communications on this channel difficult when many users are talking at the same time. Several participants interviewed by the Committee expressed frustration with this situation.

The air bridge denial program in Peru relies primarily on three aircraft: the Cessna C–560 Citation, the Cessna A–37B Dragonfly, and the Embraer T–27A Tucano. The American Citation is a twin engine corporate jet equipped and configured to perform an air-to-air radar tracking function. It has a broad airspeed operating range allowing it to cover both slow moving aircraft and faster twin engine planes. The Peruvian Air Force A–37s are converted U.S. Air Force jet trainers equipped with a 7.62mm gun in the nose. They are fast but have a limited range. Using the A–37 against slow flying planes has proven problematic. While the Committee received conflicting opinions about the actual stall speed of a fully loaded A–37, the Peruvian Air Force requires the pilots to maintain a minimum air speed of 130 knots for safety reasons. This is significantly faster than a small single engine civilian plane would normally fly.[11] Finally, the Peruvian Air Force T–27 Tucano is a single-engine turboprop fighter armed with a pod mounted 7.62mm machine gun on each wing. The plane has a long loiter time but is slower than many planes used by drug traffickers. It is, however, better suited for intercepting slower single-engine civilian aircraft.

The operations of the air bridge denial program are governed by a set of Standard Operating Procedures (SOP) agreed to by the CIA and the Peruvian Air Force. The most recent version of the SOP is dated October 1999. The SOP was intended to describe the spe-

[10] Annex D, pp. 2–4.
[11] The float plane involved in the April 20 incident was flying at approximately 115 knots.

cific steps to be taken during an intercept. The SOP also describes in great detail the functions and responsibilities of each Peruvian member of the air bridge denial program, including the ground personnel, the host nation rider and the fighter pilots.[12]

An air intercept operation begins with the detection of an unknown aircraft operating in the Peruvian Air Defense Identification Zone which covers the area of Peru east of the Andes mountains. The detection can occur in a number of ways. The vast majority of intercepts have been based on intelligence and law enforcement information which has cued the tracker aircraft to search in a certain area. Airborne radar platforms such as the AWACS, ground based radar, or the Relocatable Over the Horizon radar based in the United States can also detect suspicious aircraft tracks. If cuing information is not available, the Citation may also patrol a certain area looking for aircraft that might fit the profile of a drug trafficker. In each case, the Citation ultimately takes over tracking responsibility and begins the process of attempting to identify the plane.

The first step of the identification process requires the Citation to provide information to the VI RAT Headquarters in order for the Headquarters personnel to determine if the plane is on a legitimate flight plan. All civilian flights in Peru are required to file a flight plan with the civilian authorities. While this sounds straightforward in theory, in practice the process can take many different forms. Normally a pilot would present a flight plan to the AIS–AERO office at the airport prior to his departure. Many airfields in Peru, however, do not have an AIS–AERO office. If this is the case, the pilot may also either fax the flight plan to the nearest office or call by telephone. If neither of these options is available, a pilot can simply call the closest air traffic control tower once airborne to relay the flight plan information. Unfortunately, the Peruvians do not have a communications network that allows for easy radio contact. For example, in Iquitos the airport tower operates on VHF and a plane must have line of sight to the tower in order to communicate. This means that a flight originating from an airfield with no communications capability might be within 50 miles of the tower before communication was possible. This situation is further complicated by the presence of float planes which operate on rivers and lakes, and may not come into contact with an airport tower during the course of its flight. Nevertheless, if a pilot in flight contacts an airport tower regarding his route, the pilot is considered to have filed a valid flight plan.

In addition to information regarding the heading, altitude and speed of a suspect plane, the Citation would provide a description of the airplane and tail number if possible. This would help the sorting process[13] but is not considered essential information. Once the information has been relayed to the VI RAT, the Peruvian Air Force checks its records for a flight plan and then calls to area airports seeking a flight plan that might match the suspect aircraft.

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[12] The CIA provided the Committee with earlier versions of the SOP from March 1999 and February 1997. The CIA could not locate any other versions including the SOP from the time of the program's restart in March 1995. In addition to the SOP, the Committee derived information about intercept procedures from interviews of participants.

[13] "Sorting" is shorthand for the process of identifying an aircraft through searching for a flight plan.

This check is done by radio and the flight plans are reviewed manually, often by checking the status of flights written on a wall board. In some cases the VI RAT maintains detachments at civilian airports, such as Iquitos, and those detachments check with the civilian authorities and then report back to VI RAT Headquarters. Both the host nation rider and the VI RAT personnel on the ground maintain lists of airplanes operating in the region, and may consult this list to determine the possible identity of the plane in question. While the number of flight plans at any given airport on any particular day is small, the sorting process is cumbersome at best.

If the identification process is unsuccessful the Peruvian host nation rider will initiate a three phase process. The phases are defined in the SOP. During Phase 1, the Peruvian Air Force deploys an interceptor aircraft (the A–37 or the T–27 Tucano) to attempt to identify the suspect aircraft visually and to communicate with it via radio. If there is no radio response during Phase 1, the interceptor should employ visual signals in accordance with established ICAO (International Civil Aviation Organization) procedures. Unfortunately the SOP is not explicit on this point. While ICAO procedures are mentioned in other places, they are left out of the section describing the implementation of the three phases. This omission is all the more inconsistent given that the President's Determination in 1994 specifically referenced the ICAO procedures, and the requirement to follow these procedures is incorporated into the Peruvian law giving the Air Force the authority to conduct shootdowns.

If communication cannot be established or if the plane has not responded to instructions from the interceptor, the host nation rider on board the Citation may request authorization to move to Phase II. This phase consists of the interceptor firing warning shots parallel to the flight path of the suspect aircraft. At the inception of the air bridge denial program Phase II could only be authorized by the Commanding General of the Peruvian Air Force Sixth Territorial Air Region (VI RAT) or, in his absence, the Chief of Staff. In situations where a suspect aircraft was near the Peruvian border and therefore considered likely to flee, the Commander would often give permission for Phase I and Phase II simultaneously. At some point, however, the procedures changed, allowing the host nation rider to authorize Phase II.[14] This phase can be difficult to implement. Because of the A–37's relatively high stall speed, it is difficult to get in a position where warning shots fired parallel to a slow moving suspect aircraft will be seen. This problem is compounded during daylight hours when tracers in the ammunition are not visible easily.

If, after firing warning shots, a plane still has not responded to directions, then the host nation rider may request authorization for Phase III. As with Phase II, Phase III can only be authorized by the Commanding General of the Peruvian Air Force Sixth Territorial Air Region (V.I RAT) or, in his absence, the Chief of Staff. Once Phase III is authorized the interceptor may use weapons

[14] The Committee has been unable to determine when this procedure changed. The 1999 SOP is inconsistent. At one point the document states "The use of weapons in the intercept operation will only be authorized by The Commander General of the VI RAT." On the next page of the SOP the host nation rider's duties are described to include "to authorize the Second Phase."

against the suspect aircraft with the goal of disabling it. If disabling fire also fails to convince the pilot of the suspect aircraft to land, then the interceptor may fire to destroy the aircraft. The SOP section laying out Phase III does not mention disabling fire, only destroying the target. This may or may not be significant since an A–37 or T–27 Tucano firing on a small single-engine plane has little ability to control its firing pattern. Any such attack will likely cause significant damage to the plane and should be considered use of lethal force.

The three phases are the central aspects of an air intercept event once the interceptor has been guided to the target by the Citation. The phases, however, are not central to the training process. While deployed to Peru, the crews spend about 40 percent of their flight time in training. In a typical training mission the Citation will launch and proceed to a target area. Two A–37s will then launch and one will act as the suspect plane while the other plays the role of the interceptor. They then switch roles. During these training exercises the focus is on safely joining the Citation with the fighter and guiding the fighter to the target. These procedures have been emphasized even more following an incident in 1999 when a Citation and an A–37 bumped inflight. Once the two aircraft have safely joined, the Citation backs away and the fighter approaches the target. In training scenarios the fighter then makes the required radio calls and gets no response. This is followed by a pass to simulate warning shots and a pass to simulate a shootdown.

The training does not include attempts to use visual signals to attract the attention of the suspect aircraft. There also is no component of the training related to an alternate scenario where the aircraft may not be a trafficker. The experiences of the Citation pilot involved in the April 20 incident are indicative of the problems with this approach. Of the 80–100 tracking operations in Peru in which he was involved, the one on April 20 was the first to go past Phase I, but all of his training had focused on joining the Citation and the intercept aircraft and the implementation of Phases II and III. There also are no procedures and consequently no training for a situation where the crew disagrees on the appropriate course of action.[15]

The absence of a reference to ICAO procedures in the SOP and the training scenarios is indicative of how the air bridge denial program has evolved since 1995. Since the air bridge denial program began, the internal situation in Peru has changed dramatically and the traffickers have adjusted their tactics. Peru in 1994 was still facing a very real threat from two terrorist organizations which received substantial funding from drug trafficking. The country grew 60 percent of the world's coca and narco-dollars were undermining efforts to reform the Peruvian economy. Today the Shining Path and MRTA guerrilla movements have been rendered largely irrelevant and coca cultivation has declined almost 70 percent. While still substantial, illegal drug trafficking is not nearly the threat to Peru that it was in 1994 when the President issued his Determination.

[15] Participants explained to SSCI staff that the close working relationship in the plane obviated the need to prepare for this situation. They felt that such a situation was unlikely to occur.

The trafficking patterns and tactics have changed significantly over this time as well. The traffickers no longer use long duration flights from the main coca growing regions to Colombia to transport coca paste. They rely more heavily on river transport and other methods to move the paste closer to the Colombian and Brazilian borders and then use short hop air flights to exit Peru. Such flights are extremely difficult to detect and intercept. The traffickers also have improved their own operational and communications security, making it more difficult to preposition the air interdiction assets to find trafficker planes.

The program started feeling the effects of the changes in trafficking patterns towards the end of 1997. By 1998 law enforcement and other tipper data had all but vanished. The air bridge denial program had no successful endgames in 1998 and 1999 and only one in 2000. Also in 1996, Peruvian law was changed, shifting responsibility for airport control from the Peruvian Air Force to the Peruvian National Police. The law also gave the Peruvian National Police responsibility for conducting all law enforcement operations on the ground, meaning that the air bridge denial program could no longer destroy trafficker planes on an airstrip.

In 1997 the program encountered another problem when an intercept operation proceeded to Phase III without proper authorization. A trafficker plane was shot down after an apparent miscommunication between the host nation rider and the Commander of the VI RAT. The ensuing review determined that existing procedures were adequate to protect against the loss of innocent life while acknowledging that it was impossible to provide a 100 percent guarantee against that outcome.

The most significant change over time has been the erosion of the use of ICAO procedures used in the intercept of aircraft. The guidelines formed the centerpiece of the 1994 Memorandum of Justification and since that time were cited to U.S. policy-makers as examples of procedures designed to ensure the safety of this program. These procedures are also incorporated into Peruvian law. Nevertheless, the ICAO intercept procedures were not being followed in April 2001.

The Committee cannot determine why the ICAO procedures are not still an integral part of the SOP or when this change occurred. When asked why the visual identification and signaling techniques were not practiced during joint training exercises, U.S. participants explained that the limited fuel capacity of the A–37 did not allow time for varying scenarios. The Committee was unpersuaded by this explanation. Instead, the training concentrated on perfecting the critical and dangerous joining maneuver between the A–37 and the Citation. After the aircraft joined, the exercise scenario assumed that the suspect aircraft was a trafficker and a shootdown was inevitable. A senior Peruvian Air Force official acknowledged that the frequency of traffickers attempting to flee when challenged led them to stop using the ICAO procedures.[16]

In some ways the program suffered from its own success. In 1995 the air bridge denial program faced a target rich environment with

[16] SSCI staff interview with Major Kisic, Chief of Air Operations, Peruvian Air Force, 6/21/01.

traffickers flying a distinctive profile, almost always at night, and most intercepts were based on prior law enforcement information. After a two year drought in successful endgames, the program in 1998 started looking for new targets including picking up random tracks during the day. Unfortunately, the history of the program had by then led to the development of an operational mindset that assumed a target plane was a trafficker unless proved otherwise, rather than the other way around.

EVENTS ON APRIL 20, 2001

On Tuesday, April 17, Kevin Donaldson began the procedures required for a flight from Iquitos, Peru to Islandia, a town on the Peruvian side of the tri-border area of Peru, Colombia and Brazil. The purpose of the trip was to travel to Leticia, Colombia in order for Jim and Veronica Bowers to obtain a Peruvian residency visa for their seven month old daughter Charity. Because they were not Peruvian citizens, the Bowers were required to get the visa at a consulate outside of Peru. Since the group had to spend the night in Leticia, Mr. Donaldson was required to notify the Peruvian Ministry of Transportation and Communication in Lima. This is a standing requirement any time a plane will be away from its home airfield overnight. He faxed this notification (Annex E) to the Ministry on April 17, specifying his intention to leave the plane near Islandia on the Yavari River on the night of April 19.

Mr. Donaldson has flown in Peru, and out of Iquitos specifically, since 1989. He has been a pilot since 1977. Since 1995 he has flown exclusively in the ABWE's float plane which was based on the river near Iquitos. He had flown the Islandia to Iquitos route many times but had not made the trip in about three years.

Peruvian regulations require pilots to undergo an annual re-certification process and to submit to a physical exam every six months. Mr. Donaldson had completed the recertification process less than two months prior to the incident. During that process there was no discussion of the Air Defense Identification Zone or the policy of shooting down suspected drug trafficking planes. He was vaguely aware of the policy but does not recall receiving any formal notification. He knew that American personnel flew a Citation in the area on counter-drug missions and he recalled having been trailed by the Citation once during a short flight. However, he was not intercepted by the Peruvian fighters during this previous incident.

Since he operated from the river, he normally faxed a copy of his flight plan from his home to the AIS–AERO office at Iquitos airport. He attempted to do this on Wednesday evening, April 18, but was unable to send the fax. He contacted the AIS–AERO office by phone and filed the flight plan orally. Mr. Donaldson's father provided the Committee with a copy of the written flight plan during the staff visit to Iquitos. This document (Annex F) shows a round trip of Iquitos-Islandia-Iquitos but does not specify an overnight stay. Peruvian regulations require flight plans from point to point. Regardless, it was his verbal communication to the AIS–AERO office that constituted his filing a legitimate flight plan for his trip.

On Thursday, April 19, he called the Iquitos airport tower for clearance to takeoff and stayed in radio contact for about fifty

miles. This was near the limit of the tower's VHF radio transmission range. At this point Mr. Donaldson switched his radio to HF to stay in contact with his wife in Iquitos. He normally followed this procedure for safety reasons. Since the Peruvian air traffic control system had no communication or radar coverage over most of the jungle, he relied on his communication link with his wife in case of an emergency.

Mr. Donaldson and his passengers had an uneventful flight to Islandia and took a boat across the river to Leticia. They cleared immigration into Colombia and conducted the necessary paperwork for the Bowers' daughter in Leticia.

On Friday, morning April 20, as the party prepared to depart, Mr. Donaldson became worried about the weather. Clouds were moving in and he hurried the group along in order to stay ahead of possible storms. After takeoff the cloud cover forced him to stay low, at approximately 1000 feet. According to Mr. Donaldson, he would normally call the Leticia airport tower when he took off, but because of his altitude he was unable to contact them on his VHF radio. He proceeded at an altitude of 1000 feet until he cleared the weather. He then climbed to about 4000 feet. He attempted to contact his wife on the HF radio but encountered technical problems. His radio remained on HF.

The standard departure route from Islandia took the plane briefly into Brazilian air space. Mr. Donaldson then flew a straight line to the point where the Javari and Amazon Rivers are at their closest. He then turned north toward the Peruvian town of Caballococha on the Amazon. Once he picked up the Amazon River he turned east and followed the river toward Iquitos. This flight path allowed him to stay as close as possible to the two rivers providing him with an emergency landing option (his plane is only equipped with floats, and therefore must stay close to water). It should be noted that while the Amazon flows generally west to east, a flight following the river would not result in a straight line from Islandia to Iquitos.

About 80 miles from Iquitos, Mr. Bowers noticed a Peruvian military plane at some distance behind and to the right side of their plane. He mentioned this to Mr. Donaldson and woke his son Cory to point it out to him. Mr. Donaldson immediately switched his radio to the Iquitos airport tower frequency and notified the air traffic controller of his position. He also mentioned the presence of the military aircraft but the Iquitos tower did not respond to this comment.

The military plane then made a pass underneath the missionaries' plane. It never came close to them or flew in front of them. It never made any attempt to visually signal the float plane. Within a few minutes of the call to the Iquitos airport tower, Mr. Bowers saw the plane behind them again and noticed a puff of smoke from the nose of the fighter. Within seconds the float plane was hit by gunfire. Mr. Donaldson called to the Iquitos airport tower shouting in Spanish, "They are going to kill us. They are killing us! They are killing us!"[17] Mrs. Bowers and her daughter were killed. The

[17] Transcript of the Video Tape of the OB–1408 Incident, Peru Investigation Report: The April 20, 2001 Peruvian Shootdown Accident, 8/2/01, p.36.

plane caught fire almost immediately. Mr. Donaldson, despite a devastating wound to his left leg, managed to land the plane on the Amazon River near the town of Pebas.

In Iquitos, the same air traffic controller who Mr. Donaldson had called concerning the presence of a military aircraft had received a call sometime prior to the incident from the Santa Clara military air base co-located at the Iquitos airport. The military inquired about the location of OB–1408, the tail number of the ABWE float plane Mr. Donaldson was flying. The tower controller told him that OB–1408 was on the river at Islandia. The tower controller explained that he assumed that the Leticia airport tower would have notified him when OB–1408 left on its return flight.[18]

At 10:48 a.m.[19] on April 20 the Iquitos air traffic controller in the airport tower received a radio call from OB–1408 providing position, altitude, heading and the fact that the aircraft was on a return flight from Islandia. Mr. Donaldson also mentioned that he saw military aircraft in the area. The tower controller's only concern was the possibility of a collision. He assumed that since the pilot of OB–1408 had visual contact with the military plane there was no danger of a collision. He explained to Committee staff that military flights do not file flight plans with Peruvian civilian authorities and he had no knowledge of their activities or missions. The tower controller provided OB–1408 the data he needed for his approach to Iquitos and ended the conversation.[20]

According to Iquitos airport tower records, the radio contact with OB–1408 ended at 10:48:30 a.m (see Footnote 18). Three seconds later the tower controller received a call from a representative of the Peruvian Air Force at Santa Clara Base asking for the radial location of OB–1408. The tower responded with the plane's position, altitude and heading. The tower controller explained that Santa Clara base monitored the Iquitos airport tower radio frequency and should have heard Mr. Donaldson's call.[21]

The tower controller told Committee staff that he did not hear Mr. Donaldson's subsequent distress call when the fighter was firing on his plane. When OB–1408 did not call in again the tower controller asked other civilian aircraft to call him. Twenty to thirty minutes later the controller declared an emergency and notified the Peruvian Air Force to start a search and rescue operation.[22]

The U.S. Citation aircraft had left Pucallpa, Peru on Wednesday, April 19, and flew two surveillance missions. The plane ended its day in Iquitos, putting it in position for a mission to the Peru-Colombia-Brazil tri-border region. This is an area of known drug trafficking activity and ground based radar had identified several suspicious tracks in the region in the preceding weeks. The crew also was aware that drug traffickers in the area were known to use float planes.

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[18] The air traffic controller told SSCI staff that this call took place 2–3 hours prior to the shootdown. Staff considers it more likely that the call came during the Peruvian Air Force's attempt to find a flight plan at approximately 10: 00 a.m. This would have been about one hour before the shootdown. SSCI Interview with Iquitos Airport Personnel, 6/22/01.

[19] This time is based on records from the Iquitos airport tower. The transcript from the Citation communication systems records the call at 10:45:53.

[20] SSCI Interview with Iquitos Airport Personnel, 6/22/01.

[21] SSCI Interview with Iquitos Airport Personnel, 6/22/01.

[22] SSCI Interview with Iquitos Airport Personnel, 6/22/01.

At approximately 9:45 a.m. on April 20, the Citation notified the chain-of-command in Pucallpa that their radar had picked up an aircraft flying in the tri-border area. The transcript of this incident begins at 9:57 a.m. At 9:59 a.m. the host nation rider called his OIC and asked if there was traffic information on this flight. The OIC responded that the traffic was unknown. At 10:01 the host nation rider told the Citation pilot that it was necessary to launch the A–37 fighter aircraft. He made this request to the Peruvian OIC one minute later.

At 10:07 a.m. the Citation pilot expressed concern that the unknown aircraft had not been sorted and said he was "a little nervous about this."[23] Discussions continued within the Citation and between the plane and the ground for another few minutes. During this discussion the U.S. OIC directed the Citation crew to stay covert and not alert the suspect plane of their presence. This decision prevented the Citation from obtaining the plane's tail number. The decision was made because the planes were near the Brazilian border which would provide a safe haven for drug smugglers should they decide to flee.

As the planes traveled east, they moved further into Peru. At 10:13 a.m. the Citation pilot commented that they should follow the plane and perform Phase I and Phase 11 unless the unknown aircraft were to take evasive action. He speculated, "It could be that he is legit."[24] The pilot told the host nation rider that he did not know if the unknown aircraft was a bad guy and that it was possible that the plane would land at Iquitos where it could be checked. A few minutes later the pilot and the co-pilot discussed the suspect plane's flight pattern, noting that it did not match the profile of a drug trafficker. The pilot emphasized to the host nation rider that when the A–37 arrived it should try to identify the plane.

The Citation pilot again attempted to check for a flight plan at 10:24 a.m. The host nation rider replied that he had checked and there was no flight plan. The pilot again noted that the suspect plane was flying at the proper altitude. At 10:29 a.m. the U.S. OIC, after checking with Peruvian Air Force officials, confirmed to the Citation that there was no flight plan. At 10:30 a.m. the A–37 joined up with the Citation.

At 10:36 a.m. the host nation rider initiated Phase I and began attempts to call the suspect plane on various radio frequencies. He apparently tried the emergency frequency, 121.5, the Iquitos airport tower frequency, 124.1, and the enroute frequency, 126.9.[25] This final frequency was listed in the program SOP as one of the key contact frequencies to be used during intercept operations. The Peruvian civilian aviation community, however, no longer ased this frequency. According to air traffic control officials in Iquitos, the

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[23] Transcript of the Video Tape of the OB–1408 Incident, Peru Investigation Report: The April 20, 2001 Peruvian Shootdown Accident, 8/2/01, p. 9.

[24] Transcript of the Video Tape of the OB–1408 Incident, Peru Investigation Report: The April 20, 2001 Peruvian Shootdown Accident, 8/2/01, p. 12.

[25] The transcript from the Citation communications systems does not record the frequencies used nor does it necessarily pick up every transmission made. Interviews with the U.S. members of the crew led the SSCI staff to conclude that the host nation rider had tried all three frequencies.

frequency was retired by Peruvian civilian aviation authorities four years ago.

At 10:38 a.m. the A–37 pilot relayed the suspect plane's tail number, OB–1408, to the Citation. The host nation rider carried a list of all valid Peruvian tail numbers which identified OB–1408 as a float plane registered to the Association of Baptists for World Evangelism based in Iquitos. Although this information was available eight minutes before the A–37 opened fire, the host nation rider never checked the list. It is unclear from the transcript whether any member of the Citation crew heard this information at this point. In his interview with the joint American/Peruvian investigative team, the host nation rider explained that he did not hear the tail number until the last moments of the incident. A minute later the host nation rider informed the Peruvian OIC that Phase I was finished and "we are now going to proceed with phase two."[26] He then relayed this to the A–37. The U.S. crew began expressing more concern to the host nation rider. The A–37 pilot asked if they had authorization for Phase III.

At this point the Citation pilot became more emphatic in his attempts to slow the process down. The host nation rider either did not hear, did not understand, or chose to ignore the repeated questions from the other members of the crew. In his interview with the joint American/Peruvian investigative team, the host nation rider explained that language comprehension was a definite problem on both sides. He went on to say, however, that he was convinced the suspect aircraft was a drug trafficker throughout the process. At 10:40 a.m. he requested authorization for Phase 111. Moments later the Citation pilot called the U.S. OIC and stated "I understand this is not our call, but this guy is at 4500 feet, he is not taking evasive action. I recommend we follow him. I do not recommend phase three at this time."[27] The Citation pilot did not receive a response to his recommendation to the U.S. OIC in Pucallpa that Phase III not be authorized by Peruvian authorities. This recommendation was not renewed by the pilot.

Phase III must be authorized by the Commanding General of the VI RAT or his Chief of Staff. The General was in Lima and the Chief of Staff was in Juanjui. The Peruvian OIC contacted the General by telephone in Lima and obtained authorization for Phase III. Authorization was relayed to the host nation rider at 10:41 a.m., only five minutes after Phase I began and without any attempts to visually identify or signal the plane.

The crew continued their attempts to slow down the process and prompted the host nation rider to try further communication attempts. At 10:42 a.m the host nation rider instructed the A–37 pilot to attempt communication on the enroute frequency, 126.9. This is the frequency that is no longer used by the civilian aviation community in this part of Peru. The A–37 pilot switched from the Iquitos airport tower frequency to the un-used enroute frequency at

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[26] Transcript of the Video Tape of the OB–1408 Incident, Peru Investigation Report: The April 20, 2001 Peruvian Shootdown Accident, 8/2/01, p.27.

[27] Transcript of the Video Tape of the OB–1408 Incident, Peru Investigation Report: The April 20, 2001 Peruvian Shootdown Accident, 8/2/01, p.28. In Pucallpa, the U.S. OIC relayed this concern to the Peruvian OIC through an interpreter. He asked for clarification of whether the Peruvian OIC understood and was assured that he did. As noted previously, the SSCI staff was not permitted to interview the Peruvian OIC.

almost exactly the time that Mr. Donaldson switched his radio from HF to the Iquitos airport tower VHF frequency. At 10:44 a.m. the A–37 pilot reported that he had been unable to raise the suspect aircraft. The host nation rider again requested authorization for Phase III and the Peruvian OIC relayed confirmation of the authorization. At 10:45:58 a.m. the A–37 pilot reported that he was firing but he did not hit the aircraft. The Citation pilot, apparently unaware of this firing, stated that he believed Phase III was a mistake and the co-pilot agreed.

At 10:46:40 the Citation crew heard Mr. Donaldson call to the Iquitos airport tower relaying his position and commenting on the presence of a military aircraft. One minute and thirty-seven seconds passed before the fatal shots hit Veronica and Charity Bowers. The Citation pilot tried to get the host nation rider to understand that the suspect aircraft was heading for Iquitos, creating more doubt about whether the plane was a drug trafficker. At 10:47:19 a.m. the following exchange occurred,

Citation Pilot: "Aider [the host nation rider] . . ."

Host Nation Rider: "Si Bob?"

Citation Pilot: "VHF1, he's [Mr. Donaldson in OB–1408] talking to him!"

Host Nation Rider: "Okay, wait a minute."

Citation Pilot: "VHF I, he is talking to Oscar Bravo! [Mr. Donaldson's plane]" [28]

The host nation rider finally instructed the A–37 to stop Phase III. The Citation crew noted smoke trailing from the plane and tracked it as it landed on the Amazon River.

Residents of a nearby town rescued the surviving missionaries by boat. They waited, however, until the A–37 had left the area fearing a possible strafing run. According to Mr. Donaldson and Mr. Bowers, the initial press reports that the fighter made firing passes at the survivors were untrue.

The air interdiction program in Peru has been suspended. The United States also has suspended support to the Colombian counter-drug air interdiction program.

CONCLUSIONS

1. Nothing which Kevin Donaldson did or did not do on April 20th merited his aircraft being shot down. Although initial portions of his route were deemed suspicious, Mr. Donaldson at the time of his intercept was flying level, at or above 4000 feet, at a constant speed, farther into Peru in the general direction of a major city, and not toward or near any international boundary. These flight and route characteristics do not resemble typical drug trafficking aircraft practices.

[28] The Committee notes that there are discrepancies between the initial transcript submitted to the Committee and the transcript subsequently included in the Joint American/Peruvian Investigation Report. For instance, the latter transcript omits the statement by the host nation rider ackowledging the Citation pilot ("Si Bob") as the pilot tries to explain that the suspect aircraft was communicating to Iquitos airport tower. This exchange took place 45 seconds before the fatal shots were fired. The Committee urges that these differences be reconciled in a single transcript. The exchange included above is drawn from both versions and supported by an SSCI staff review of the video tape.

2. There was an erosion of the safety procedures which had been put in place to protect innocent life. The ICAO procedures for visually signaling a suspect aircraft were not followed, and the Peruvian Air Force and the CIA did little, if any, training on that aspect of their mission. Adherence to such procedures became more important and should have received additional attention as law enforcement and intelligence information on narcotics flights decreased, and the narcotics traffickers changed their flight patterns in response to this program. Participants in the program seemed to have an operational assumption that an intercepted plane without a flight plan was a drug trafficker. Clearly, the presumption of innocence should have been paramount.

3. The Peruvian host nation rider and his chain-of-command showed a tragic lack of judgment in the April 20, 2001 incident. Recognition by any of the Peruvian officials of Mr. Donaldson's flight profile and route alone would have precluded the precipitous rush to authorize use of lethal force. Instead, the Peruvian host nation rider and his chain-of-command never questioned their initial presumption that Mr. Donaldson's plane was a narcotics trafficker. Individuals focused on the accomplishment of specific tasks as part of a check list rather than as part of a process necessary to reach a conclusion about the nature of the suspect aircraft. Neither the host nation rider nor his chain-of-command consulted lists of tail numbers in their possession that would have shown that the suspect aircraft was registered to a missionary organization. The A–37 pilot failed to make visual contact with the plane or employ visual signals in accordance with established ICAO procedures and Peruvian law. The host nation rider prematurely sought and received authorization for Phase III although the suspect plane was 100 miles inside Peruvian air space, was flying slow and level, and not attempting to flee. Neither the Peruvian OIC or the Commanding General exercised the required leadership. Without direct access to the host nation rider and pilots, the Committee can offer no rational explanation for their decision to forgo ICAO visual signals.

4. The Peruvian air traffic control system is clearly inadequate to fulfill this mission with the requisite level of confidence. Their methods of filing flight plans, sorting aircraft, and tracking aircraft are limited and haphazard. The Peruvians did not properly advise or train general aviation pilots of the risks encountered and procedures needed when transiting the Air Defense Identification Zone. The lack of coordination and communication between the Peruvian civilian and military authorities further complicates this situation.

5. The inadequate language skills of both the Peruvian and American participants contributed to the overall confusion on April 20. American officials managing this program had noted the problems created by language deficiencies and had taken some steps to address the problem. These steps, however, were limited by the constant rotation of host nation riders and U.S. aircrews.

6. The communications architecture for this program was cumbersome and delayed the efficientflow of information. Dual chains-of-command operating on an already overburdened radio frequency in two different languages, coupled with the need to communicate

with the A–37 on a separate frequency, added to the difficulty of maintaining an overall view of the events as they unfolded.

7. The Peruvian Air Force is ill-equipped to conduct this program in an effective and safe manner. Peruvian Air Force A–37 interceptors are not capable of safely identifying and intercepting slow moving aircraft, and their inadequate range does not permit more realistic intercept training practices. Conversely, the T–27 Tucanos are too slow to intercept faster twin engine planes used by the drug traffickers.

8. The chain-of-command structure and the procedures for conducting an intercept operation removed the U.S. participants from the decisionmaking process. Only the Peruvians had the authority to order a shootdown. Despite their lack of direct authority the U.S. crew repeatedly asked the host nation rider to take further steps to identify the aircraft and expressed strong reservations to their own chain of command when the operation proceeded to Phase III. Members of the Committee are troubled by the fact that the intercept operation on April 20 continued even though the U.S. crew felt that the authorization of deadly force was a mistake.

9. The U.S. Government exercised inadequate oversight of this program, contributing to the degradation of adherence to safety procedures. CIA officials, as well as policy makers at the State Department and the National Security Council, failed to adequately monitor the operation of this risky program.

10. The air bridge denial program in Peru has made a significant difference in the fight against cocaine trafficking, but it is possible that similar results could have been achieved in Peru with a different mix of counter-drug policies. The conflicting results from Peru and Colombia's air bridge denial programs, together with the success of Bolivia's forced eradication and alternative development program, makes it difficult to judge the effectiveness of the air bridge denial policy on overall regional coca cultivation.

11. The situation in Peru has changed dramatically since the program began in 1994. Coca cultivation is down dramatically in Peru, the drug traffickers have altered their trafficking patterns, and the national security threat to Peru from guerrilla groups that drew support from the illegal coca trade has all but disappeared. Those responsible for program oversight failed to account for these changes in assessing the need to continue the program.

RECOMMENDATIONS

1. The legal requirement for a Presidential Determination prior to providing U.S. assistance to a foreign government engaged in a program of interdicting drug trafficking planes should be changed to an annual Presidential Certification process with more thorough reporting requirements. The revised process should include, at a minimum, a certification of the extraordinary threat posed by drug trafficking to the national security of the country in question, and an enhanced requirement for appropriate safety procedures to protect against innocent loss of life. The use of ICAO visual identification and signaling procedures should be integral to any program and the annual review should document evidence of the use of these procedures. The certification also should contain a requirement that the foreign country have specific evidence that a plane

is engaged in drug trafficking prior to the use of weapons. This evidence could be witnessing trafficking activity such as loading or unloading drugs from a plane, prior law enforcement or intelligence information identifying the plane, or attempts to flee when challenged by law enforcement or military aircraft.

2. U.S. support to the Peruvian counter-drug air interdiction program should not be resumed unless and until the President has made a Certification as described in Recommendation 1, and the U.S. and Peruvian Governments have addressed the specific shortcomings highlighted by the April 20 tragedy and subsequent reviews.

- The system for filing and retrieving flight plans must be improved and automated to the extent possible.
- The process for identifying an unknown aircraft must be streamlined and centralized, but should rely on all available data resources including but not limited to identification by tall number.
- Program training must be expanded to include all possible situations and contingencies, including instructions to U.S. personnel on what should be done in circumstances when they believe innocent life is in jeopardy based on a mistake in fact or a lack of adherence to proper procedures.
- The advisability and feasability of empowering U.S. officials involved in intercept operations with an operational termination authority should be thoroughly explored by both governments.
- Interceptor aircraft must be deployed in mixed teams with an A–37 and a T–27 Tucano based together to allow commanders the flexibility to respond based on the type of aircraft intercepted.
- Language skills must be improved on both sides of the crew and, if possible, a single language should be used throughout the operation. In the final analysis, however, the United States must bear the responsibility to field fluent Spanish-speaking air crews.
- The communications architecture must be enhanced, possibly through the establishment of a dedicated frequency for intercept operations.
- The authorization chain-of-command should require the presence of the Commanding General or his Chief of Staff at the VI RAT Headquarters during an intercept operation.
- The Peruvians should assign a smaller cadre of host nation riders to the program to increase stability, maximize training benefits, and enhance crew cohesiveness.
- Finally, the United States should explore the option of turning the tracker mission over to the Peruvians only if done in conjunction with the other recommendations in this report.

3. U.S. assistance to Peruvian drug interdiction efforts should place more emphasis on supporting law enforcement efforts against suspected trafficker aircraft rather than a military response. The Embassy country team already has been working to increase the cooperation between the Peruvian Air Force and Peruvian National Police. A program combining the strengths of these two organizations and that focuses on the seizure of planes and the arrest of traffickers could effectively substitute for the current air bridge denial program.

4. In view of the fact that other government agencies, including the U.S. Customs Service and the Department of Defense, also

have been deeply involved in counter-drug air interdiction operations, the Executive Branch should re-assess whether there is a need to use the CIA, an agency normally associated only with secret programs. The public acknowledgment of this program argues for transferring responsibility to a different agency.

ANNEX A

UNITED STATES ASSISTANCE TO COUNTRIES THAT SHOOT DOWN CIVIL AIRCRAFT INVOLVED IN DRUG TRAFFICKING

The Aircraft Sabotage Act of 1984 applies to the police and military personnel of foreign governments. In particular, the Act applies to the use of deadly force by such foreign governmental actors against civil aircraft in flight that are suspected of transporting illegal drugs. There is accordingly a substantial risk that United States Government officers and employees who provide flight tracking information or certain other forms of assistance to the aerial interdiction programs of foreign governments that have destroyed such aircraft, or that have announced an intent to do so, would be aiding and abetting conduct that violated the Act.

JULY 14, 1994

MEMORANDUM FOR JAMIE S. GORELICK DEPUTY ATTORNEY GENERAL

This memorandum summarizes our earlier advice concerning whether and in what circumstances United States Government (USG) officers and employees may lawfully provide flight tracking information and other forms of technical assistance to the Republics of Colombia and Peru. The information and other assistance at issue have been provided to the aerial interdiction programs of those two countries for the purpose of enabling them to locate and intercept aircraft suspected of engaging in illegal drug trafficking.

Concern over the in-flight destruction of civil aircraft as a component of the counternarcotics programs of foreign governments is not novel. In 1990, soon after the inception of the USG assistance program, the United States made an oral démarche to the Colombian government informing that government that Colombian use of USG intelligence information to effect shootdowns could result in the suspension of that assistance.

More recently, we understand that the government of Peru has used weapons against aircraft suspected of transporting drugs and that the government of Colombia announced its intention to destroy in-flight civil aircraft suspected of involvement in drug trafficking. The possibility that these governments might use the information or other assistance furnished by the United States to shoot down civil aircraft raises the question of the extent to which the United States and its governmental personnel may lawfully continue to provide assistance to such programs.

On May 1, 1994, in light of these concerns, the Department of Defense suspended a variety of assistance programs. Thereafter, in a draft opinion, an interagency working group concluded that the United States aid was probably unlawful. The group included lawyers from the Criminal Division, the Departments of State, Defense

(including the Joint Chiefs of Staff), the Treasury, and Transportation (including the Coast Guard), and the Federal Aviation Administration. On May 26, 1994, this Department advised all relevant agencies that assistance programs directly and materially supportive of shootdowns should be suspended pending the completion of a thorough review of the legal questions.

As we have previously advised, after careful consideration of the text, structure and history of the Aircraft Sabotage Act of 1984, the most relevant part of which is codified at 18 U.S.C. § 32(b)(2), we have concluded that this statute applies to governmental actors, including the police and military personnel of foreign countries such as Colombia and Peru. Accordingly, there is a substantial risk that USG personnel who furnish assistance to the aerial interdiction programs of those countries could be aiding and abetting criminal violations of the Aircraft Sabotage Act. *See* 18 U.S.C. § 2(a) (aiding and abetting statute). We caution, however, that these conclusions are premised on our close analysis of section 32(b)(2) and should not be taken to mean that other domestic criminal statutes will necessarily apply to USG personnel acting officially.

I.

International law forms an indispensable backdrop for understanding section 32(b)(2). A primary source of international law regarding international civil aviation is the Convention on International Civil Aviation, Dec. 7, 1944, 61 Stat. 1180, T.I.A.S. No. 1591, 15 U.N.T.S. 295 (the Chicago Convention). The Chicago Convention is administered by the International Civil Aviation Organization (ICAO).

Article 3(d) of the Chicago Convention declares that "[t]he contracting States undertake, when issuing regulations for their state aircraft, that they will have due regard for the safety of navigation of civil aircraft." Parties have interpreted the due regard standard quite strictly, and have argued that this provision proscribes the use of weapons by states against civil aircraft in flight.[1] For example, the United States invoked this provision during the international controversy over the Korean Air Lines Flight 007 (KAL 007) incident.[2] While acknowledging that Article I of the Chicago Convention recognized the customary rule that "every State has complete and exclusive sovereignty over the airspace above its territory," the United States argued that the Soviet Union had violated both Article 3(d) and customary international legal norms in shooting down KAL 007. The Administrator of the Federal Aviation Authority stated to the ICAO Council that:

The ICAO countries have agreed that they will "have due regard for the safety of navigation of civil aircraft" when issuing regulations for their military aircraft. It is self-evident that intercepts of

[1] Article 89 of the Chicago Convention relieves a state party from its obligations under the Convention if it declares a national emergency and certifies that declaration to ICAO. To date, neither Colombia nor Peru has made such a certification. The Chicago Convention contains no explicit exemption permitting the in-flight destruction of aircraft suspected of carrying contraband or of otherwise being involved in the drug trade.

[2] On September 1, 1983, a Soviet military aircraft shot down a civil aircraft, KAL 007, that had overflown Soviet territory while on a scheduled international flight to Seoul.

civil aircraft by military aircraft must be governed by this paramount concern.

The international community has rejected deadly assault on a civil airliner by a military aircraft in time of peace as totally unacceptable. It violates not only the basic principles set forth in the [Chicago] convention but also the fundamental norms of international law . . .[3]

In the wake of KAL 007, the ICAO Assembly unanimously adopted an amendment to the Chicago Convention to make more explicit the prohibitions of Article 3(d).[4] This amendment, Article 3 *bis*, reads in part as follows:

> (a) The contracting States recognize that every State must refrain from resorting to the use of weapons against civil aircraft in flight and that, in case of interception, the lives of persons on board and the safety of aircraft must not be endangered. This provision shall not be interpreted as modifying in any way the rights and obligations of States set forth in the Charter of the United Nations.[5]

Article 3 *bis*should be understood to preclude states from shooting down civil aircraft suspected of drug trafficking, and the only recognized exception to this rule is self-defense from attack.[6] We understand that the United States has not yet ratified Article 3 *bis*. There is, however, support for the view that the principle it announced is declaratory of customary international law.[7]

In addition to the Chicago Convention, the United States has ratified the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation [Sabotage], Sept. 23, 1971, 24 U.S.T. 567, T.I.A.S. 7570 (the Montréal Convention). Article 1 of the latter Convention specifies certain substantive offenses against civil aircraft: in particular, Article 1,1(b) states that "[a]ny person commits an offence if he unlawfully and intentionally . . . destroys an aircraft in service or causes damage to such an aircraft which renders it incapable of flight or which is likely to endanger its safety in flight." Article 1,2 makes it an offense to attempt to commit a previously enumerated offense, or to be an accomplice of an offender.[8] Further, Article 10 requires states "in accordance with

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[3] *FAA Administrator Helms' Statement, ICAO Council, Montreal, Sept. 15, 1983*, 83 Dep't St. Bull. 17, 18 (Oct. 1983). We further note that the ICAO Council Resolution of September 16,1983, condemned the shootdown of KAL 007 and "[r]eaffirm[ed] the principle that States, when intercepting civil aircraft, should not use weapons against them." *Id.* at 20.

[4] *See* Jeffrey D. Laveson, *Korean Airline Flight 007: Stalemate in International Aviation Law—A Proposal for Enforcement*, 22 San Diego L. Rev. 859, 882–84 (1985).

[5] USG representatives proposed a reference to the United Nations Charter to reflect the view that an international law prohibition on the use of weapons against civil aircraft in flight would not restrict a state's right of self-defense as provided for in Article 51 of the Charter.

[6] *See* Steven B. Stokdyk, Comment, *Airborne Drug Trafficking Deterrence: Can A Shootdown Policy Fly?*, 38 UCLA L. Rev. 1287,1306 (1991).

[7] *See, e.g.*, Andreas F. Lowenfeld, *Looking Back and Looking Ahead*, 83 Am. J. Int'l L. 336, 341 & n. 17 (1989); Sompong Sucharitkul, *Procedure for the Protection of Civil Aircraft in Flight*, 16 Loy. L.A. Int'l & Comp. L.J. 513, 519–20 (1994). *But see* D.J. Harris, *Cases and Materials on International Law* 221 (4th ed. 1991).

[8] In general, the furnishing of information or assistance to another nation in circumstances that clearly indicate a serious risk that the information or assistance will be used by that nation to commit a wrongful act may itself be a wrongful act under international law. *Cf.* Article 27 of the International Law Commission's Draft Convention on State Responsibility, which provides that "[a]id or assistance by a State to another State, if it is established that it is rendered for the commission of an internationally wrongful act carried out by the latter, itself constitutes an internationally wrongful act, even if, taken alone, such aid or assistance would not constitute

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international and national law," to "endeavour to take all practicable measures for the purpose of preventing" substantive offenses.

The Montréal Convention imposes on states certain duties with respect to offenders or alleged offenders. Article 3 declares that the contracting states "undertake[] to make the offenses mentioned in Article I punishable by severe penalties." This obligation is specified by requiring states to take measures to establish jurisdiction over certain offenses (Article 5), to take custody of alleged offenders within their territory (Article 6), and either to extradite the alleged offender or to submit the case to their competent authorities for prosecution (Article 7). Further, states have the obligation to report the circumstances of an offense, and the results of their extradition or prosecution proceedings, to the ICAO (Article 13).

Nearly all nations with a significant involvement in air traffic are parties to the Montréal Convention, and have thus incurred the responsibility to execute it. The United States implemented the Convention in 1984 by enacting the Aircraft Sabotage Act, Pub. L. No. 98–473, tit. II, ch. XX, pt. B, §§ 2011–2015, 98 Stat. 1837, 2187 (1984). Congress specifically stated that legislation's purpose was "to implement fully the [Montréal] Convention . . . and to expand the protection accorded to aircraft and related facilities." *Id.*, § 2012(3); *see also* S. Rep. No. 619, 98th Cong., 2d Sess. (1984), *reprinted in* 1984 U.S.C.C.A.N. 3682.[9] The criminal prohibition now codified at 18 U.S.C. § 32(b)(2) was enacted as part of that legislation.

II.

We turn to the question of criminal liability under domestic law. At least two criminal statutes are relevant to this inquiry. The first is 18 U.S.C. § 32(b)(2), which implements Article 1,1(b) of the Montréal Convention, and prohibits the destruction of civil aircraft. The second is 18 U.S.C. § 2(a), which codifies the principle of aiding and abetting liability.[10]

A.

18 U.S.C. § 32(b)(2) was enacted in 1984, one year after the destruction of KAL 007. The statute makes it a crime "willfully" to "destroy[] a civil aircraft registered in a country other than the

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the breach of an international obligation." Report of the International Law Commission on the Work of its Thirty-Second Session, [1980] 2 Y.B. Int'l L. Comm'n 33, U.N. Doc. A/35/10.

[9] It is undoubtedly within Congress's power to provide that attacks on civil aircraft should be criminal acts under domestic law, even if they were committed extraterritorially and even absent any special connection between this country and the offense. An attack on civil aircraft can be considered a crime of "universal concern" to the community of nations. *See United States* v. *Yunis*, 924 F.2d 1086,1091 (D.C. Cir. 1991); *see generally* Kenneth C. Randall, *Universal Jurisdiction Under International Law* 66 Tex. L. Rev. 785 (1988).

[10] Other criminal statutes may also be relevant. For example, 49 U.S.C. app. § 1472(i)(1) makes it a crime to commit, or to attempt to commit, aircraft piracy. "Aircraft piracy" is defined to "mean[] any seizure or exercise of control, by force or violence or threat of force or violence, or by any other form of intimidation, and with wrongful intent, of an aircraft within the special aircraft jurisdiction of the United States." *Id.*, § 1472(i)(2). The "special aircraft jurisdiction of the United States" includes "civil aircraft of the United States" while such aircraft is in flight. *Id.*, § 1301(38)(a). We do not consider in this memorandum whether the prohibition on aircraft piracy, or any criminal statutes other than section 32(b) and the aiding and abetting and conspiracy statutes, would be applicable to the USG activities in question here.

United States while such aircraft is in service or cause[] damage to such an aircraft which renders that aircraft incapable of flight or which is likely to endanger that aircraft's safety in flight."[11] The text, structure and legislative history of the statute establish that it applies to the actions of the Peruvian and Columbian officials at issue here.

The term "civil aircraft," as used in section 32(b)(2), is defined broadly to include "any aircraft other than . . . an aircraft which is owned and operated by a governmental entity for other than commercial purposes or which is exclusively leased by such governmental entity for not less than 90 continuous days." 49 U.S.C. app. §§ 1301(17), (36) (definitions section of Federal Aviation Act of 1958). *See* 18 U.S.C. § 31 (in chapter including section 32(b)(2), "civil aircraft" has meaning ascribed to term in Federal Aviation Act). The qualifying language providing that the section applies to "civil aircraft *registered in a country other than the United States,*" 18 U.S.C. § 32(b)(2) (emphasis added), has an expansive rather than restrictive purpose—to extend United States criminal jurisdiction over persons destroying civil aircraft '"even if a U.S. aircraft was not involved and the act was not within this country.'" *United States* v. *Yunis*, 681 F. Supp. 896, 906 (D.D.C. 1988) (citation omitted).[12]

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[11] Section 32(b) is a felony statute, and pursuant to 18 U.S.C. § 34, persons who violate section 32 are subject to "the death penalty or to imprisonment for life" if the crime "resulted in the death of any person." However, section 34 predates the Supreme Court decision in *Furman* v. *Georgia*, 408 U.S. 238 (1972), and may not be applicable consistent with that decision. In a pending case, *United States* v. *Cheely*, No. 92–30257, 1994 WL 116868 (9th Cir. Apr. 11, 1994), a divided panel of the Ninth Circuit issued an opinion on April 11, 1994, concluding that the death penalty provided for by 18 U.S.C. § 844(d) (which incorporates section 34 by reference), is unconstitutional. However, the court has, *sua sponte*, requested the parties to address the issue whether the case should be reheard en banc, and it remains uncertain whether section 34 can be applied constitutionally. Pending crime legislation would resolve this issue for future violations by providing a constitutional death penalty provision.

[12] It might be argued that section 32(b)(2)'s reference to aircraft "registered in a country other than the United States" is restrictive in meaning, *i.e.*, that the section does not protect *unregistered* aircraft. Moreover, we are informed that the registration numbers of aircraft engaged in drug trafficking over Colombia and Peru have in some cases been painted over or otherwise obscured. It is suggested that unregistered aircraft, or aircraft whose registration is concealed, may be made targets under a shootdown policy without violating the statute. There are several flaws in this suggestion. (1) Congress stated that its purpose in enacting the Aircraft Sabotage Act was "to implement fully" the Montréal Convention. *See* 18 U.S.C. § 31 note. Article 1,1(b) of the Convention (from which 18 U.S.C. § 32(b)(2) is derived) prohibits the destruction of civil aircraft *as such*, without regard to registration. Because section 32(a)(1) had already forbidden the willful destruction of "any aircraft in the special aircraft jurisdiction of the United States or any civil aircraft used, operated, or employed in interstate, overseas, or foreign air commerce," Congress evidently sought to discharge this country's remaining obligations under the Montréal Convention by affording the same protection to all other civil aircraft. Accordingly, the protections provided by section 32(b)(2) should not be deemed to hinge on whether a foreign civil aircraft is in fact registered; had Congress done no more than that, the United States would have fallen short of fulfilling its treaty obligations, although Congress intended that it should fulfill them. Section 32(b)(2)'s reference to "civil aircraft registered in a country other than the United States" "must be taken to refer to the class with which the statute undertakes to deal." *United States* v. *Jin Fuey Moy*, 241 U.S. 394, 402 (1916) (Holmes, J.) (construing scope of registration requirement in criminal statute). *See also United States* v. *Rodgers*, 466 U.S. 475, 478–82 (1984); *Continental Training Services* v. *Cavazos*, 893 F.2d 877, 883 (7th Cir. 1990). (2) We are advised by the Federal Aviation Authority that the concealment or obscuring of a registration number does not legally "deregister" an airplane, and that only an official act by the registering government can achieve that effect. Accordingly, suspected drug traffickers whose registration is concealed cannot be deemed to be unregistered. (3) There is no logical connection between the class of aircraft engaged in drug smuggling and the class of unregistered aircraft. Nor do we know of any empirical evidence that the two classes significantly overlap. Further, drug traffickers may own, lease or steal planes; and even if it were their practice not to register the planes they own, the owners of the planes they have leased or stolen might normally do so. (4) We are also unaware of any reliable means by which foreign law enforcers who have intercepted a plane could determine while it was in flight whether it was registered or not. In-

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Section 32(b)(2) was intended to apply to governmental actors (here, the military and police forces of Colombia and Peru) as well as to private persons and groups. When Congress adopted section 32(b)(2) in 1984, it had been a crime for nearly thirty years under section 32(a)(1) for anyone willfully to "set[] fire to, damage[], destroy[], disable[], or wreck[] any aircraft in the special aircraft jurisdiction of the United States or any civil aircraft used, operated, or employed in interstate, overseas, or foreign air commerce." 18 U.S.C. § 32(a)(1).[13] This Department has sought, under section 32(a), to prosecute state actors whom it believes to have sponsored terrorist acts (specifically, the bombing of Pan American Flight 103 at the behest of Libya). Because of the obvious linguistic and structural similarities between sections 32(a)(1) and 32(b)(2), we read those sections to have the same coverage in this regard, *i.e.* to apply to governmental and non-governmental actors alike.[14]

The legislative history of the Aircraft Sabotage Act confirms that Congress intended section 32(b)(2) to reach governmental actions. The original bill was introduced as part of a package of four related measures proposed by the Administration and designed to enable the United States to combat international terrorism, including state-sponsored actions, more effectively. In submitting this legislative package to Congress, the President explained that it was largely concerned with

> a very worrisome and alarming new kind of terrorism . . .: the direct use of instruments of terror *by foreign states.* This "state terrorism" . . . accounts for the great majority of terrorist murders and assassinations. Also disturbing is state-provided training, financing, and logistical support to terrorists and terrorist groups.

Message to the Congress Transmitting Proposed Legislation To Combat International Terrorism, *Pub. Papers of Ronald Reagan* 575 (1984) (emphasis added).

Further, in testimony given at a Senate Judiciary Committee hearing on these bills on June 5, 1984, Wayne R. Gilbert, Deputy Assistant Director of the Criminal Investigative Division of the Federal Bureau of Investigation, underscored that:

> Recent years reflect increasing concern both in the United States and in foreign nations over the use of terrorism *by foreign governments* or groups. We have seen an increased propensity on the part of terrorist entities to plan and carry out terrorist acts worldwide.

Legislative Initiatives to Curb Domestic and International Terrorism: Hearings Before the Subcomm. on Security and Terrorism of the Senate Comm. on the Judiciary, 98th Cong., 2d Sess. 44 (1984) (Hearings (statement of Wayne R. Gilbert) (em-

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deed, the very act of destroying a plane might prevent investigators from determining its registration (if any). Thus, it would be difficult, if not impossible, to monitor a "shoot down" policy so as to ensure that the participants in it avoided criminal liability by targeting only unregistered planes.

[13] Section 32(a) was adopted in 1956, *see* Pub. L. No. 84–709, 70 Stat. 538, 539 (1956).

[14] While section 32(a) does not have the broad extraterritorial scope of section 32(b)(2), it does apply to acts against United States-registered aircraft abroad, and thus would apply with respect to any such aircraft shot down by Colombian or Peruvian authorities.

phasis added). In written testimony, the Department of Justice also explained that "[t]hese four bills address some of the risks caused by the growing worldwide terrorism problem, *especially state-supported terrorism.*" *Hearings* at 46–47 (Prepared Statement of Victoria Toensing, Deputy Assistant Attorney General, Criminal Division) (emphasis added).[15] The legislative history of section 32(b)(2) thus shows that the statute was intended to reach shootdowns by officials or agents of governments as well as by private individuals and organizations.

Because section 32(b)(2) applies generally to foreign governments, it must apply to shootdowns of foreign-registered civil aircraft by law enforcement officers or military personnel of the governments of Colombia and Peru. The statute contains no exemption for shootdowns in pursuance of foreign law enforcement activity; nor does it exempt shootdowns of aircraft suspected of carrying contraband.[16] USG personnel who aid and abet violations of section 32(b)(2) by the Colombian or Peruvian governments are thus themselves exposed to criminal liability by virtue of 18 U.S.C. § 2(a), *see* Part II below.[17]

Our conclusion that section 32(b)(2) applies to governmental action should not be understood to mean that other domestic criminal statutes apply to USG personnel acting officially. Our Office's precedents establish the need for careful examination of each individual statute. For example, we have opined that USG officials acting within the course and scope of their duties were not subject to section 5 of the Neutrality Act, 18 U.S.C. § 960. *See Application of Neutrality Act to Official Government Activities*, 8 Op. O.L.C. 58 (1984) (*Neutrality Act Opinion*). In general terms, that statute forbids the planning of, provision for, or participation in "any military or naval expedition or enterprise to be carried on from [the United States] against the territory or dominion of any foreign prince or state . . . with whom the United States is at peace," 18 U.S.C. § 960; it does not explicitly exempt USG-sponsored activity. Our conclusion with respect to the Neutrality Act was based upon an examination of the legislative history of the Act, its practical construction over two centuries by Presidents and Congresses, and the judicial decisions interpreting it.[18]

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[15] In a colloquy between Senator Denton and Mr. Gilbert on the bill addressed to aircraft sabotage, Senator Denton commented that "we should not ignore the fact that in Libya a General Wolf, whose full name is Marcus Wolf, set up and acts as the chief of Libyan Intelligence." *Hearings* at 81. In context, Senator Denton's comment seems to reflect his understanding that the legislation would reach state-sponsored attacks on civil aircraft or air passengers and the officials responsible for such attacks.

[16] AIthough the legislative history emphasizes the dangers of state-sponsored "terrorism," we do not understand the statute to exempt state activity that could arguably be characterized as "law enforcement." An action such as the Soviet Union's shooting down of KAL 007 could have been viewed as the enforcement of national security laws regulating overflights in militarily sensitive airspace, and thus distinguished from acts of terrorist violence. Nevertheless, we think that section 32(b)(2) would apply to such attacks on civil aviation.

[17] Section 32(b)(2) would also apply directly to USG personnel who themselves shot down foreign-registered civil aircraft, although on the facts as we understand them such conduct—as distinct from aiding and abetting foreign governmental violations—is not at issue here. (For further discussion, *see* Pt. V below.) Nothing in the legislative history of section 32(b)(2) suggests that that statute would not apply to USG personnel in proper cases as much as it does to foreign governmental personnel.

[18] We noted in the *Neutrality Act Opinion* that "the Act's purpose was to enhance the President's ability to implement the foreign policy goals that have been developed by him, with appropriate participation by Congress." *Neutrality Act Opinion*, 8 Op. O.L.C. at 72. Accordingly, we found that "it would indeed be anomalous" to construe that Act to limit what USG officials

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B.

The question we have been asked presupposes that USG personnel would not themselves directly carry out shootdowns of civil aircraft or encourage others to do so. Thus the lawfulness of USG activities and the potential liability of USG personnel, under the circumstances outlined to us, depend on the proper application of the federal aider and abettor statute, 18 U.S.C. § 2(a).

Section 2(a) does not itself define any criminal offense, but rather provides that a person who is sufficiently associated with the criminal act of another is liable as a principal for that act.

> Under the "classic interpretation" of this offense, "[i]n order to aid and abet another to commit a crime it is necessary that a defendant in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed."

United States v. *Monroe,* 990 F.2d 1370, 1373 (D.C. Cir. 1993) (quoting *Nye & Nissen* v. *United States,* 336 U.S. 613, 619 (1949)) (internal quotation marks and citations omitted).

Aiding and abetting liability for a crime can be usefully analyzed as consisting of three elements: "[1] *knowledge* of the illegal activity that is being aided and abetted, [2] a *desire* to help the activity succeed, and [3] some *act* of helping." *United States* v. *Zafiro,* 945 F.2d 881, 887 (7th Cir. 199 1) (enumeration added), *aff'd,* 113 S. Ct. 93 3 (1993). All three elements must be present for aiding and abetting liability to attach. *Id.*

1. Knowledge of unlawful activity. A person must know, about unlawful activity in order to be guilty of aiding and abetting it: "a person cannot very well aid a venture he does not know about." *United States* v. *Allen.* 10 F.3d 405, 415 (7th Cir. 1993). With respect to most or perhaps all countries to which the United States provides information or other assistance (other than Colombia and Peru), the absence of this first element of aiding and abetting eliminates entirely any possibility that the USG activities implicate § 18 U.S.C. § 32(b). In the absence of some serious reason to think otherwise, the United States is entitled to assume that the governments of other nations will abide by their international commitments (such as the Chicago Convention) and customary international law. The fact that another government theoretically could act otherwise cannot render USG aid activities legally problematic. Furthermore, the United States is under no general obligation to attempt to determine whether another government has an as-yet unrevealed intention to misuse USG assistance in a violation of

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acting under Presidential foreign policy directives could lawfully do. *Id.* By contrast, interpreting the Aircraft Sabotage Act to reach such actors would not obstruct the statute's purpose, which in any case was not to ensure the President's ability to conduct a unified and consistent foreign policy unimpeded by private citizens' interferences. If anything, it would be contrary to the Aircraft Sabotage Act's policy of protecting international civil aviation from armed attacks to allow USG officials, but not those of any other country, to carry out such attacks. Furthermore, although it is often true that "'statutes which in general terms divest pre-existing rights or privileges will not be applied to the sovereign without express words to that effect,'" *id.* (quoting *United States* v. *United Mine Workers,* 330 U.S. 258, 272 (1947)), that maxim is "'no hard and fast rule of exclusion,' . . . and much depends on the context, the subject matter, legislative history, and executive interpretation."*Wilson* v. *Omaha Indian Tribe,* 442 U.S. 653, 667 (1979) (quoting *United States* v. *Cooper Corp.,* 312 U.S. 600, 604–05 (1941)).

section 32(b). *See United States* v. *Giovannetti,* 919 F.2d 1223, 1228 (7th Cir. 1990) ("Aider and abettor liability is not negligence liability."). Therefore, if a foreign nation with no announced policy or known practice of unlawful shootdowns did in fact use USG aid in carrying out a shootdown, that event would create no liability for the prior acts of USG personnel, although it probably would require a reevaluation of USG assistance to that country and, depending on the circumstances, might require changes in that assistance.

The same analysis, however, does not apply where the foreign state does have an announced policy or known practice of carrying out shootdowns that violate section 32(b)(2)—precisely the situation with respect to Colombia and Peru. It is obvious that the United States has knowledge of Colombia's publicly avowed policy. We believe that the United States is equally on notice about Peru's *de facto* shootdown policy on the basis of the incidents that have occurred.[19] It appears to be settled law that the knowledge element of aiding and abetting is satisfied where the alleged aider and abettor attempted to escape responsibility through a "deliberate effort to avoid guilty knowledge" of the primary actor's intentions. *Giovannetti,* 919 F.2d at 1229. Someone who suspected the existence of illegal activity that his or her actions were furthering and who took steps to ensure that the suspicion was never confirmed, "far from showing that he was not an aider and abettor . . . would show that he was." *Id.* On the facts as presented to us, we think that the knowledge element is met with respect to Colombia and Peru unless there is a change in the policies of those countries.

2. Desire to facilitate the unlawful activity. "[T]he aider and abettor must share the principal's purpose" in order to be liable under § 18 U.S.C. § 2. *United States* v. *Fountain,* 768 F.2d 790, 798 (7th Cir.), *cert. denied,* 475 U.S. 1124 (1986). The contours of this element in the definition of aiding and abetting are not without ambiguity, *see Zafiro,* 945 F.2d at 887, although as a general matter mere knowledge of the criminal activity (the existence of the first, knowledge element) does not in itself satisfy this second, purpose element. Many courts state the purpose element in terms of a "specific intent that [the aider and abettor's] act or omission bring about the underlying crime," *United States* v. *Zambrano,* 776 F.2d 1091, 1097 (2d Cir. 1985), and the Supreme Court's most recent restatement of the aiding and abetting statute's reach suggests—if it does not quite endorse—this view. *See Central Bank of Denver* v. *First Interstate Bank* 114 S. Ct. 1439, 1450 (1994) (section 2(a) "decrees that those who provide knowing aid to persons committing federal crimes, with the intent to facilitate the crime, are themselves committing a crime") (citing *Nye & Nissen,* 336 U.S. 613).

At first glance it might appear that the United States could negate this element of aiding and abetting—and thus render USG assistance to Colombia and Peru lawful and USG personnel free of potential liability under 18 U.S.C. § 32(b)(2)—simply by announcing this Government's opposition to any violations of section 32(b) by

[19] For the purposes of the aiding and abetting statute, it is immaterial whether an aider and abettor knew of the unlawful activity because the primary actor told him or her, or simply took actions that made obvious what was happening. *See generally Giovannetti,* 919 F.2d at 1226–29.

anyone. It might seem that after such an announcement it would not be possible to say that USG personnel acted with a desire to help unlawful shootdowns succeed. However, "there is support for relaxing this requirement [of specific intent to bring about the criminal act] when the crime is particularly grave: . . . 'the seller of gasoline who knew the buyer was using his product to make Molotov cocktails for terroristic use'" would be guilty of aiding and abetting the buyer's subsequent use of the "cocktails" in an act of terrorism. *Fountain* 768 F.2d at 798 (quoting with approval *People* v. *Lauri* 251 Cal. App. 2d 471, 481 (1967) (*dictum*)). Where a person provides assistance that he or she knows will contribute directly and in an essential manner to a serious criminal act, a court readily may infer a desire to facilitate that act. *See Zafiro,* 945 F.2d at 887 (if someone "knowingly provides essential assistance, we can infer that [that person] does want [the primary actor] to succeed, for that is the natural consequence of his deliberate act").[20]

Were this a case in which a foreign government provided direct and material assistance to an attack upon United States civil aircraft, both our Government and, we believe, the courts of this country would view the offense against section 32(b)(2) to be of a very serious nature, and would adopt an expansive view of the "desire to help the [unlawful] activity succeed" that constitutes this element of aiding and abetting. *United States* v. *Carson,* 9 F.3d 576, 586 (7th Cir. 1993). As we understand the facts, USG assistance is critical to the ability of Colombia and Peru to effect shootdowns. USG personnel have been fully engaged in the air interdiction operations of each country, providing substantial assistance that has contributed in an essential, direct and immediate way (whether by "real time" information or otherwise) to those countries' ability to shoot down civil aircraft. Moreover, our assistance has been of a type and extent that Colombia and Peru would have difficulty in providing for themselves or in obtaining from other sources. In the absence of changes in the policies and practices of Colombia and Peru, there is a very substantial danger that the USG activities described to us meet the purpose element of aiding and abetting.

3. Acts of assistance. The application of the third element to the question we are considering is, we think, fairly straightforward. As the Supreme Court recently reiterated, aiding and abetting "'comprehends all assistance rendered by words, acts, encouragement, support, or presence.'" *Reves* v. *Ernest & Young,* 113 S. Ct. 1163, 1170 (1993) (quoting *Black's Law Dictionary* 68 (6th ed. 1990)). Gauged by this definition, many or most forms of USG activities that have been described to us could be fairly described as "act[s] of helping" Colombia or Peru to carry out a shootdown policy. That conclusion, when combined with our analysis of the knowledge and

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[20] In general, USG information-sharing and other forms of assistance to foreign nations do not implicate the United States in those nations' actions because, among other reasons, the purpose element of aiding and abetting is not met. However important USG aid may be as an overall matter, the provision of information, resources, training, and support to a foreign nation would not in itself provide a basis for concluding that the United States intended to facilitate that nation's unlawful actions. Indeed, the general nature of such aid and its legitimate purposes (the furtherance of the diplomatic, national security, and democraticization goals of USG foreign policy) rebut any assertion that its purpose is to support the occasional or unexpected unlawful acts of recipient governments. *See generally United States* v. *Pino-Perez,* 870 F.2d 1230, 1237 (7th Cir.) (en banc) (aiding and abetting requires "a fuller engagement with [the primary actor's] activities" than accidental or isolated assistance creates), *cert. denied,* 493 U.S. 901 (1989).

purpose elements, leads us to think that there is grave risk that the described USG activities contravene 18 U.S.C. § 32(b)(2).

C.

It has been suggested that the problems for USG information-sharing and other assistance to Colombia and Peru that are posed by 18 U.S.C. §§ 2(a) and 32(b) might be eliminated by seeking assurances from the governments of those countries with respect to their shootdown activities. Two possible forms of such an assurance have been posited: an assurance that Colombia and Peru would engage in no more shootdowns of civil aircraft, or an assurance that Colombia and Peru would make no use of information (or other aid) provided by the United States in effecting shootdowns. The argument would be that such assurances would negate either the first, knowledge element, or the second, purpose prong of aiding and abetting.

An initial point applies to both forms of assurance: to be of any legal significance, an assurance must be made by an official of the other government with authority to bind that government, and it must be deemed reliable by a high officer of the United States, acting with full knowledge of the relevant facts and circumstances. Assurances from subordinate officials could not reasonably be taken to represent a position that would be adhered to by other officials of that government. The acceptance of assurances that were not deemed credible *in fact* by USG officials might readily be characterized as a "deliberate effort to avoid [the] knowledge," *Giovannetti,* 919 F.2d at 1229, that the assurance did not represent the actual intentions of the other government. In light of the gravity of the issue, the decision to accept and act on such an assurance would be a policy decision of such significance that it could be appropriately made only by a very high officer of this Government.

A reliable assurance (as we have defined it) that the foreign government would carry out *no* shootdowns falling within the prohibition of section 32(b)(2) would, in our opinion, clearly negate the knowledge element of aiding and abetting. With such an assurance, there would be no known or suspected intention to effect unlawful shootdowns for USG officials to have knowledge of, put another way, the acceptance of such an assurance as reliable would constitute a judgment that the foreign government was engaged in no criminal activity in this respect. If it subsequently became apparent that this judgment was mistaken, a reevaluation of the legal status of USG assistance would be necessary, but until and if evidence emerged that the other government intended to violate its assurance, USG aid of all sorts, including the provision of real-time flight information, would be lawful. For similar reasons, a reliable assurance that the foreign government would not carry out any unlawful shootdowns would eliminate any argument that USG officials had a "desire to help the activity succeed," *Carson* 9 F.3d at 586, because it would represent a judgment that no unlawful activity was contemplated or under way.

A more problematic case is posed if the foreign government declined to renounce its shootdown policy but offered assurances that it would not use USG-supplied information or other assistance in

carrying out shootdowns violating section 32(b)(2). (In such a case, the foreign government might carry out such activities using information or assistance obtained from other sources.) A bare assurance to that effect, without more, would be insufficient to remove the risk of contravening the statute, given what we understand to be the widespread use of USG-supplied information, the commingling of USG and foreign government information, and the temptation on the part of the foreign government's operational officers to make use of information or assistance extremely valuable to effecting their own government's law enforcement program.

We believe that there are conditions in which such assurances would be sufficiently reliable to permit the United States to continue to provide information and assistance to a foreign country's antinarcotics program even if that country declined to renounce its shootdown policy. First, the United States and the foreign country should agree that the sole purpose for which USG information and other assistance would be provided and used was to assist in the execution of a ground-based end game (searches, seizures and arrests), and that such information and assistance would not be used to target civil aircraft for destruction. Second, the agreement should establish mechanisms by which USG personnel would obtain detailed and specific knowledge as to how the USG-provided information and assistance were in fact being used, and thus be able to identify at an operational level any instances of non-compliance with the agreement. Third, the agreement should stipulate that if any incident should occur in which the foreign government's agents fired on a civil aircraft, USG personnel would be able to verify whether USG-provided information and assistance had been used in that instance, or whether the foreign country had employed only information and assistance from other sources in carrying out that operation. Finally, the agreement should provide for the termination of USG-supplied information and assistance in the event of material non-compliance. Were it possible to reach an agreement that incorporated such safeguards, we believe that it would insulate USG personnel from liability in the event the foreign government destroyed a civil aircraft.

III.

United States aid to Colombia and Peru might also implicate USG personnel in those governments' shootdown policies on a conspiracy rationale. *See* 18 U.S.C. § 371. The concept of conspiracy is distinct from that of aiding and abetting.[21] Aiding and abetting liability does not depend on an actual agreement between the pri-

[21] In this memorandum, we focus on the potential for aiding and abetting liability for two reasons. First, it is unclear that under the circumstances outlined to us the relationship between the activities of USG personnel and shootdown actions by foreign governments could reasonably be deemed an "agreement" to violate 18 U.S.C. § 32(b)(2). A lesser degree of association with a criminal venture suffices to create aiding and abetting liability, however, and we think that a more serious argument can be made that some forms of USG assistance could fall within the definition of aiding and abetting. *See United States* v. *Cowart*, 595 F.2d 1023, 1031 (5th Cir. 1979) (the '"community of unlawful intent"' present in aiding and abetting, although "similar to the 'agreement' upon which the crime of conspiracy is based, does not rise to the level of 'agreement'"). In addition, and vitally, as stated in the text we believe the risk that USG personnel might plausibly be viewed as conspirators can and should be eliminated by the communication to foreign governments and USG operational personnel of the United States's firm opposition to any shootdowns of civil aircraft contrary to section 32(b)(2) or international law.

mary actor and the aider and abettor.[22] In contrast, "agreement remains the essential element of the crime, and serves to distinguish conspiracy from aiding and abetting which, although often based on agreement, does not require proof of that fact." *Jannelli* v. *United States,* 420 U.S. 770, 777 n.10 (1975). In addition, liability for participation in a conspiracy may attach to someone even though he or she provides no material assistance toward the conspiracy's goals, and even if the primary criminal activity that is the object of the conspiracy never takes place. *See, e.g., United States* v. *Townsend* 924 F.2d 1385, 1399 (7th Cir. 1991).[23] USG activities—including information-sharing and technical advice—that would be of material assistance in effecting shootdowns do not in themselves constitute an agreement between USG personnel and others to carry out shootdowns, but as we understand the facts the following are both true: (1) The United States intends, and has agreed with the governments of Colombia and Peru, to bolster the antinarcotics law enforcement activities of those countries. (2) The governments of Colombia (expressly) and Peru (in practice) regard shootdowns as an integral part of their antinarcotics law enforcement activities. In those circumstances, courts might well view the distinction between USG assistance to their antinarcotics programs generally and USG assistance to the shootdown component of those programs as thin or non-existent, and thus construe ongoing USG assistance as evidence of an agreement. *See United States* v. *Lechug* 994 F.2d 346, 350 (7th Cir.) (en banc), *cert. denied,* 114 S. Ct. 482 (1993).

We believe that it is imperative to make this Government's disapproval of shootdowns in violation of section 32(b) clear in order to eliminate any suggestion that USG personnel have entered into a conspiratorial agreement with foreign officials involving unlawful shootdowns since liability as a conspirator attaches even if the substantive unlawful act never takes place. In addition, we think that USG agencies should specifically instruct their personnel not to enter into any agreements or arrangements with the officials or agents of foreign governments that encourage or condone shootdowns. *See generally Iannelli,* 420 U.S. at 777–79.

IV.

This case is characterized by a combination of factors: it involves a criminal statute that explicitly has extraterritorial reach, that is applicable to foreign government military and police personnel, and that defines a very serious offense. Moreover, our Government is fully engaged in furnishing direct and substantial assistance that is not otherwise available to the foreign nations involved, and at

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[22] The Seventh Circuit recently hypothesized a case illustrating this point.

> Suppose someone who admired criminals and hated the police learned that the police were planning a raid on a drug ring, and, hoping to foil the raid and assure the success of the ring, warned its members—with whom he had no previous, or for that matter subsequent, dealings—of the impending raid. He would be an aider and abettor of the drug conspiracy, but not a member of it.

Carson, 9 F.3d at 586 (quoting *United States* v. *Zafiro,* 945 F.2d at 884).

[23] Thus, USG personnel theoretically could be liable for conspiracy if their actions were construed as constituting an agreement with officials of the foreign government to carry out shootdowns and if the latter took some overt action toward accomplishing a shootdown. It would be unnecessary under the law of conspiracy for a shootdown to take place or for any USG actions actually to contribute to a shootdown.

least some of the USG personnel who provide that assistance have actual knowledge that it is likely to be used in committing violations.

Given this combination of factors, we conclude that, in the absence of reliable assurances in the sense defined above, USG agencies and personnel may not provide information (whether "real-time" or other) or other USG assistance (including training and equipment) to Colombia or Peru in circumstances in which there is a reasonably foreseeable possibility that such information or assistance will be used in shooting down civil aircraft, including aircraft suspected of drug trafficking.

Furthermore, we note that section 32(b)(2) prohibits the destruction of civil aircraft "while such aircraft is *in service* " as well as "damage to such an aircraft which renders that aircraft incapable of flight" (emphasis added). The statute defines "[i]n service" to "mean[] any time from the beginning of preflight preparation of the aircraft by ground personnel or by the crew for a specific flight until twenty-four hours after any landing." 18 U.S.C. § 3 1. Thus, USG assistance for certain operations against aircraft *on the ground* may come within the statutory prohibitions. Section 32(b)(2) does not preclude ordinary law enforcement operations directed at a plane's crew or cargo during those times.[24] It does, however, appear to forbid airborne law enforcers to bomb or strafe a suspect plane that has landed or that is preparing to take off.[25]

We will be pleased to co-operate with legal counsel for other agencies in evaluating specific programs or forms of aid under that standard.

V.

Our conclusions here must not be exaggerated. We have been asked a specific question about particular forms of USG assistance to the Colombian and Peruvian aerial interdiction programs. The application of the legal standard described here to any other USG programs—including other programs designed to benefit Colombia or Peru—will require careful, fact-sensitive analysis. We see no need to modify USG programs whose connection to those governments' shootdown policies is remote and attenuated, and (as noted above) we perceive no implications for USG assistance to any other foreign country unless another government adopts a policy of shooting down civil aircraft.

Other limitations on our conclusions should be noted. In certain circumstances, USG personnel may employ deadly force against civil aircraft without subjecting themselves to liability under sec-

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[24] For example, nothing in the section forbids the police to order the crew of a suspected drug trafficking plane to surrender upon landing, or to search or seize the plane or its cargo. (Consequential damage to the aircraft would not constitute a violation of the statute.) Nor does the section forbid the police to use deadly force against a plane if they are themselves endangered by its crew's armed resistance to their legitimate orders. The police may also use force to rescue any hostages held aboard the plane.

[25] A valid law enforcement operation intended to seize a plane on the ground and arrest its crew and an attack on the airplane itself in violation of section 32(b)(2) may both result in the disabling or destruction of the aircraft. No liability under the section would attach, either to primary actors or to those who assist them, in the former circumstance. As described to us, however, the Colombian and Peruvian countemarcotics programs each encompass (potential) actions that would intentionally fall within the latter, forbidden category. Obviously, on different facts we could reach a different conclusion.

tion 32(b)(2). "The act is a criminal statute, and therefore must be construed strictly, 'lest those be brought within its reach who are not clearly included.'"[26] Although these circumstances are extremely limited, they may in fact arise.

Specifically, we believe that the section would not apply to the actions of United States military forces acting on behalf of the United States during a state of hostilities.[27] CMAs discussed above, section 32(b)(2) was intended to implement the United States's obligations under the Montreal Convention. That Convention does not appear to apply to acts of armed forces that are otherwise governed by the laws of armed conflict.[28] The general rule under the law of armed conflict is that civil aircraft are immune from attack unless they are being used for military purposes or pose an immediate military threat.[29] We do not think that section 32(b)(2) should be construed to have the surprising and almost certainly unintended effect of criminalizing actions by military personnel that are lawful under international law and the laws of armed conflict. We note specifically that the application of section 32(b)(2) to acts of United States military personnel in a state of hostilities could readily lead to absurdities: for example, it could mean in some circumstances that military personnel would not be able to engage in reasonable self-defense without subjecting themselves to the risk of criminal prosecution. Unless Congress by a clear and unequivocal statement declares otherwise, section 32(b)(2) should be construed to avoid such outcomes.[30] Thus, we do not think the statute, as written,

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[26] *Export Sales of Agricultural Commodities to Soviet Union and Eastern European Bloc Countries*, 42 Op. Att'y Gen. 229, 232 (1963) (quoting *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537, 542 (1943)).

[27] We do not mean to confine a "state of hostilities" to some specific legal category, such as a state of declared war in the constitutional sense, *see* U.S. Const. art. I, 8, cl. 11, or a situation such as to trigger the reporting requirements of the War Powers Resolution, *see* 50 U,S.C. 1543(a).

[28] International agreements such as the Montréal Convention are generally concluded with a view to regulating ordinary, peace-time conditions. Accordingly, one treatise writer has stated it to be the general rule that '"[i]f, as the result of a war, a neutral or belligerent State is faced with the necessity of taking extraordinary measures temporarily affecting the application of such conventions in order to protect its neutrality or for the purposes of national defence, it is entitled to do so even if no express reservations are made in the convention.'" Bin Cheng, *The Law of International Air Transport* 483 (1962) (quoting *The S.S. Wimbledon* (Gr. Brit. *et al.* v. *Gerrm.*), 1923 P.C.I.J. (ser. A) No. 1, at 36 (Aug. 17) (dissenting opinion of Judges Anzilotti and Huber)). *Accord* Preliminary Objections Submitted by the United States of America, *Case Concerning the Aerial Incident of 3 July 1988* (*Islamic Republic of Iran* v. *United States of America* (March 4, 1991), pp. 200, 203 ("the Montreal Convention was intended to prevent and deter saboteurs and terrorists from unlawfully interfering with civil aviation and endangering innocent lives. The drafters of the Convention did not discuss the actions of military forces acting on behalf of a State during hostilities, and there is no reason to believe that they intended the Convention to extend to such actions. . . . Infringements on the laws of armed conflict through international agreements primarily addressing situations other than armed conflict are not to be presumed. There is no indication that the drafters of the Montreal Convention intended it to apply to military forces acting in armed conflict. If they had so intended, they would have had to address a myriad of issues relating to acts by military forces."). This conclusion is corroborated by article 89 of the Chicago Convention, which declares in part that "[i]n case of war, the provisions of this Convention shall not affect the freedom of action of any of the contracting States affected, whether as belligerents or as neutrals." *See* David K. Linnan, *Iran Air Flight 655 and Beyond: Free Passape, Mistaken Self-Defense, and State Responsibility*, 16 Yale J. Int'l L. 245, 267 (1991) ("the nature of the Montreal Convention as an anti-hijacking and sabotage treaty seems to preclude its application to the acts of armed forces governed by the law of armed conflict under article 89 of the Chicago Convention"). *See also* 7 Green Hackworth, *Digest of International Law* 552–55 (1943) (describing earlier practice and theory).

[29] *See* Department of the Air Force, *International Law—The Conduct of Armed Conflict and Air Operations*, ¶4–3(a)(1), (b) (1976); Comment, *Airborne Drug Trafficking Deterrence: Can a Shootdown Policy Fly?*, 38 UCLA L. Rev. at 1321.

[30] *Cf United States* v. *Kirby* 74 U.S. (7 Wall.) 482, 486–87 (1869) (holding that statute punishing obstruction of mail did not apply to temporary detention of mail caused by carrier's arrest

Continued

should apply to such incidents as the downing on July 3, 1988 of Iran Air Flight 655 by the United States Navy cruiser *Vincennes*.[31]

Furthermore, even in cases in which the laws of armed conflict are inapplicable, we believe that a USG officer or employee may use deadly force against civil aircraft without violating section 32(b)(2) if he or she reasonably believes that the aircraft poses a threat of serious physical harm to the officer or employee or to another person.[32] A situation of this kind could arise, for example, if an aircraft suspected of narcotics trafficking began firing on, or attempted to ram, a law enforcement aircraft that was tracking it. Assuming that such aggressive actions posed a direct and immediate threat to the lives of USG personnel or of others aboard the tracking aircraft, and that no reasonably safe alternative would dispel that threat, we believe that the use of such force would not constitute a violation of section 32(b)(2).[33]

WALTER DELLINGER,
Assistant Attorney General.

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for murder); *Nardone* v. *United States*, 302 U. S. 379, 384 (1937) (public officers may be implicitly excluded from statutory language embracing all persons because "a reading which would include such officers would work obvious absurdity as, for example, the application of a speed law to a policeman pursuing a criminal or the driver of a fire engine responding to an alarm").

[31] *See* Marian Nash Leich, *Denial of Liability: Ex Gratia Compensation on a Humanitarian Basis*, 83 Am. J. Int'l L. 319, 321–22 (1989) (quoting Congressional testimony of State Department Legal Adviser Sofaer that "[i]n the case of the Iran Air incident, the damage caused in firing upon #655 was incidental to the lawful use of force. . . . The commander of the U.S.S. *Vincennes* evidently believed that his ship was under imminent threat of attack from a hostile aircraft, and he attempted repeatedly to identify or contact the aircraft before taking defensive action. Therefore, the United States does not accept legal responsibility for this incident. . . .").

[32] *See Tennessee* v. *Garner*, 471 U.S. 1, 11 (1985) (discussing constitutionally reasonable use of deadly force); *New Orleans and Northeastern R. Co.* v. *Jolles*, 142 U.S. 18, 23 (1891) ("the law of self-defence justifies an act done in honest and reasonable belief of immediate danger").

[33] To the extent that section 32(b)(2) does not apply to the use of deadly force by USG military or other personnel in the circumstances described above, it would of necessity be inapplicable as well to the actions of similarly situated personnel of the Colombian or Peruvian governments. That is, such foreign governmental agents could employ deadly force against civilian aircraft in the same circumstances in which USG personnel were able to do so. USG personnel who assisted foreign government agents in such lawful and legitimate acts of self-defense would of course not be subject to liability, since one cannot be prosecuted for aiding and abetting the commission of an act that is not itself a crime. See *Shuttlesworth* v. *City of Birmingham*, 373 U.S. 262 (1963).

Annex B

SEC. 1012. OFFICIAL IMMUNITY FOR AUTHORIZED EMPLOYEES AND AGENTS OF THE UNITED STATES AND FOREIGN COUNTRIES ENGAGED IN INTERDICTION OF AIRCRAFT USED IN ILLICIT DRUG TRAFFICKING.

(a) EMPLOYEES AND AGENTS OF FOREIGN COUNTRIES.—Notwithstanding any other provision of law, it shall not be unlawful for authorized employees or agents of a foreign country (including members of the armed forces of that country) to interdict or attempt to interdict an aircraft in that country's territory or airspace if—

(1) that aircraft is reasonably suspected to be primarily engaged in illicit drug trafficking; and

(2) the President of the United States, before the interdiction occurs, has determined with respect to that country that—

(A) interdiction is necessary because of the extraordinary threat posed by illicit drug trafficking to the national security of that country; and

(B) the country has appropriate procedures in place to protect against innocent loss of life in the air and on the ground in connection with interdiction, which shall at a minimum include effective means to identify and warn an aircraft before the use of force directed against the aircraft.

(b) EMPLOYEES AND AGENTS OF THE UNITED STATES.—Notwithstanding any other provision of law, it shall not be unlawful for authorized employees or agents of the United States (including members of the Armed Forces of the United States) to provide assistance for the interdiction actions of foreign countries authorized under subsection (a). The provision of such assistance shall not give rise to any civil action seeking money damages or any other. form of relief against the United States or its employees or agents (including members of the Armed Forces of the United States).

(c) DEFINITIONS.—For purposes of this section:

(1) The terms "interdict" and "interdiction", with respect to an aircraft, mean to damage, render inoperative, or destroy the aircraft.

(2) The term "illicit drug trafficking" means illicit trafficking in narcotic drugs, psychotropic substances, and other controlled substances, as such activities are described by any international narcotics control agreement to which the United States is a signatory, or by the domestic law of the country in whose territory or airspace the interdiction is occurring.

(3) The term "assistance" includes operational, training, intelligence, logistical, technical, and administrative assistance.

ANNEX C

THE WHITE HOUSE,
WASHINGTON,
December 8, 1994.

Presidential Determination No. 95–9

MEMORANDUM FOR THE SECRETARY OF STATE AND THE SECRETARY OF DEFENSE

SUBJECT: Resumption of U.S. Drug Interdiction Assistance to the Government of Peru

Pursuant to the authority vested in me by section 1012 of the National Defense Authorization Act for Fiscal Year 1995, Public Law 103–337, I hereby determine with respect to Peru that: (a) interdiction of aircraft reasonably suspected to be primarily engaged in illicit drug trafficking in that country's airspace is necessary because of the extraordinary threat posed by illicit drug trafficking to the national security of that country; and (b) that country has appropriate procedures in place to protect against innocent loss of life in the air and on the ground in connection with such interdiction, which shall at a minimum include effective means to identify and warn an aircraft before the use of force is directed against the aircraft.

The Secretary of State is authorized and directed to publish this determination in the Federal Register.

WILLIAM J. CLINTON.

ANNEX D

MEMORANDUM OF JUSTIFICATION FOR PRESIDENTIAL DETERMINATION REGARDING THE RESUMPTION OF U.S. AERIAL TRACKING INFORMATION SHARING AND OTHER ASSISTANCE TO THE GOVERNMENT OF PERU

Section 1012 of the National Defense Authorization Act for Fiscal Year 1995 provides that "[n]otwithstanding any other provision of law, it shall not be unlawful for authorized employees or agents of a foreign country . . . to interdict or attempt to interdict an aircraft in that country's territory or airspace if—

(1) that aircraft is reasonably suspected to be primarily engaged in illicit drug trafficking; and

(2) the President . . . has determined with respect to that country that—

(A) interdiction is necessary because of the extraordinary threat posed by illicit drug trafficking to the national security of that country; and

(B) the country has appropriate procedures in place to protect against innocent loss of life in the air and on the ground in connection with interdiction, which shall at a minimum include effective means to identify and warn an aircraft before the use of force directed against the aircraft."

Narcotics production and trafficking pose a grave threat to Peru's national security. Sixty percent of the world's coca leaf supply is grown east of the Andes in Peru. The resulting drug trade, generating billions of dollars of illicit profits annually, has undermined the Government of Peru's efforts to put the legitimate Peruvian economy on a stable footing due to the effects of narcodollars on the black market economy. Trafficking has also impeded concerted efforts to bring legitimate political and agricultural development to rural areas, and weakened military and law enforcement institutions by narcotics corruption. Above all, Peruvian narcotics trafficking organizations have provided substantial funding to Peruvian terrorist organizations, specifically the Shining Path and MRTA, fueling a vicious guerrilla war which has resulted in two thirds of the country being placed under martial law, and left thousands dead since 1980.

Illegal flights by general aviation aircraft are the lifeline of the traffickers operations. They move narcotics and related contraband, such as chemicals, currency, and weapons into and through Peru and they ferry logistical supplies to production sites and staging areas. In the face of this threat, the Government of Peru lacks the resources to control all of its airspace and to respond when trafficker aircraft land at remote locations outside the effective control

of the government. Accordingly, drug smuggling aircraft flagrantly defy Peru's sovereignty, penetrating its borders at will and flying freely throughout the country.

In response to this clear threat to national security, the Government of Peru authorized its Air Force to use force, if necessary, to control narcotics smuggling aircraft over its territory. Initiated in early 1991, the policy has deterred narcotics smuggling flights.

On May 1, 1994, the U.S. Department of Defense ceased providing real-time intelligence to the Government of Peru. Based on an interagency legal review, the Department of Justice subsequently advised that U.S. domestic criminal law could be interpreted to preclude sharing of intelligence with countries that used this information to shoot down civil aviation aircraft. The lack of intelligence has severely hindered Peru's efforts to stop the drug production and trafficking that threaten its national security. Section 1012 of U.S. Public Law 103–337 (the 1995 National Defense Authorization Act) was enacted specifically to address legal concerns relating to the sharing of intelligence.

Peruvian decree law no. 25426, dated April 9, 1992, contemplates the use of arms against narcotics trafficking civil aircraft under very restricted conditions and only in a specially declared Air Defense Identification Zone (ADIZ) comprising Peruvian territory east of the crest of the Andes mountain chain.

The GOP has established rigorous procedures to ensure adequate protection against the loss of innocent life. The procedures for identifying and communicating with intercepted aircraft are based on ICAO guidelines, and are contained in classified GOP plans and orders, as well as in Civil Aviation law 24882. The procedures are summarized below:

It is the national policy of Peru that narco-trafficking aircraft are by their nature "hostile" to Peruvian national security; the use of weapons against such aircraft in flight by the Peruvian Air Force may be authorized under very strict conditions after all attempts to identify innocent aircraft and to persuade the suspect aircraft to land at a controlled airfield have been exhausted. The U.S. Government knows of no instance in which Peruvian Air Force aircraft have deviated from the procedures described below. The GOP has placed additional conditions and controls on the use of such force—specifically prohibiting attacks on commercial passenger aircraft.

Peru's air interdiction procedures are in four phases:

- Detection: U.S. and/o Peruvian Air Force (PAF) detection and monitoring systems cind and track any aircraft passing through the specially designated ADIZ airspace during hours of daylight. (All general aviation traffic not operating on a regular schedule along established routes is prohibited in the ADIZ during hours of darkness.)
- Identitication: The PAF will attempt to identify an aircraft as a legitimate flight. This will include determining whether the aircraft is on a previously filed flight plan and by attempting to establish radio communication with the aircraft. When control centers (ground and/or air radars) detect an overflight of any aircraft, they will attempt to identify it through correlation of flight plans and by electronic means—through use of IFF or radio communications.

• Intercept: If the PAF determines that an aircraft flying in the ADIZ is not on a previously approved flight plan, and if it is not possible to establish communication and confirm the aircraft's identification as an innocent aircraft, the Commanding General of the Peruvian Air Force Sixth Territorial Air Region (VI RAT) may direct the launch of interceptor aircraft to visually identify the aircraft; verify its registry, attempt to establish radio contact, and, if necessary, cause the aircraft to proceed to a safe and adequate air strip where the PAF will require the aircraft to land using intercept procedures consistent with International Civil Aviation Organization guidelines.

If radio communication is established during the intercept, but the PAF is not satisfied that the aircraft is on a legitimate mission, the PAF may direct the aircraft to land at a safe and adequate air strip. If radio contact is not possible, the PAF pilot must use a series of internationally recognized procedures to make visual contact with the suspect aircraft and to direct the aircraft to follow the intercepting aircraft to a secure airfield for inspection.

• Use of Weapons: If the aircraft continues to ignore the internationally recognized instructions to land, the PAF pilot—only after gaining permission, of the Commanding General of the VI–RAT or in his absence the Chief of Staff—may fire warning shots in accordance with specified PAF procedures. If these are ignored, and only after again obtaining the approval of the Commanding General of the VI RAT or in his absence the Chief of Staff, the PAF pilot may use weapons against the trafficking aircraft with the goal of disabling it. Finally, if such fire does not cause the intercepted pilot to obey PAF instructions, the V1 RAT commander may order the trafficker aircraft shot down.

The final decision to use force against civil aircraft in flight—once all other steps have been exhausted—requires authorization from the VI RAT Commander—or in his absence his Chief of Staff—who will verify that all appropriate procedures have been fulfilled.

Peruvian air interdiction procedures also protect against innocent loss of life on the ground. The decision to fire at an aircraft requires approval of the Commander of the Peruvian Air Force Sixth Territorial Air Region—or his Chief of Staff. These procedures do not contemplate the use of weapons against an aircraft flying over a populated area. The ADIZ in Peru covers areas which are very sparsely populated.

With respect to interceptors firing against trafficking aircraft on the ground, the procedures are similar to those for an aircraft in flight. When a pilot encounters a suspect aircraft on the ground, he must attempt to establish radio communication with the aircraft and employ visual signals which are also observable by any other persons on the ground in the vicinity. Only in response to armed attack or in the event that the aircraft attempts to take off after communication, identification, and warning procedures have been completed may the VI–RAT commander authorize use of weapons to disable the aircraft if there is no risk to innocent bystanders.

The Peruvian procedures are designed to identify for interception aircraft that are likely to be engaged in drug trafficking and, for aircraft so intercepted, to provide proper notice that they are required to land. These procedures minimize the risk of misidentification. Any decision to fire on civil aircraft, and the procedures and events leading to it, will subsequently be reviewed by the GOP pursuant to legal provisions and sanctions available to it against any GOP official who deviates from established procedures.

The U.S.C. and GOP jointly operate all radar facilities and the Sixth Territorial Air Region command center in Peru. Peruvian personnel accompany most U.S.G. airborne tracking platforms overflying Peru. As part of their standard operating instructions, all official U.S.G. personnel in jointly manned facilities and platforms will regularly monitor compliance with agreed procedures and immediately report irregularities through their chain of command. Should there be evidence suggesting that procedures are not being followed, the U.S.C. will reevaluate whether Peru has appropriate procedures to protect against the loss of innocent life.

ANNEX E

ASOCIACIÓN BAUTISTA DE EVANGELIZACIÓN MUNDIAL,
Miércoles, 18 de abril de 2001.

SOLICITUD DE PERNOCTE A FAVOR DE ASOCIACION BAUTISTA DE EVANGELIZACION MUNDIAL

Ministerio de Transportes y Comunicaciones
División Aeronáutica
Dirección General
Director General de Transporte de Transporte Aéreo
FAX # 014–33–28–08

De parte de: KEVIN D. DONALDSON,
Director Gerente, Asociación Bautista de Evangelización Mundial, Yavari # 782, Iquitos, Perú.

MUY AMABLE SEÑOR: Kevin D. Donaldson, de nacionalidad Estadounidense, identificado con C.E. numero N–68941, siendo el Director Gerente y representante legal de la misión: ASOCIACION BAUTISTA DE EVANGELIZACION MUNDIAL, solicito a Ud. el permiso de pernoctar el día jueves, el 19 del mes presente.

Tenemos un vuelo en el cual el cliente desea pernoctar en Islandia del Rio Yavari.

Atentamente,

KEVIN D. DONALDSON.

ANNEX F

CORPORACION PERUANA DE AEROPUERTOS
Y AVIACION COMERCIAL S.A.
PLAN DE VUELO PERU

DESTINATARIO: CORPAC, IQUITOS
ORIGENADOR: Asociación Bautista de Evangelización Mundial, Yavari #782, Tel/FAX 23-5663

IDENTIFICACION AERONAVE	REGLAS DE VUELO	TIPO DE VUELO
OB-1408	**VFR**	**G**

TIPO DE AERONAVE	CAT DE ESTELA TURBULENTA	EQUIPO
C-185	**L**	**S**

AERÓDROMO DE SALIDA	HORA
Z Z ZZ	**1 3 0 0**

VELOCIDAD DE CRUCERO	NIVEL	RUTA
N 0110	**F 0 3 0**	

IQUITOS—Islandia---IQUITOS

AERÓDROMO DE DESTINO	EET TOTAL
Z Z Z Z	**2HR 10 MIN**

OTROS DATOS

SALIDA: RIO AMAZONAS, PADRE ISLA (IQUITOS)
DESTINO: **RIO YAVARI (Islandia)**

INFORMACION SUPLEMENTARIA

	AUTONOMIA	PERSONAS A BORDO	EQUIPO RADIO DE EMERGE NCIA UHF	VHF	ELT
--E/	6 HR 00 MIN	5	U	V	E

EQUIPOS DE SUPERVIVENCIA: S ~~P~~ ~~D~~ ~~M~~ J J / ~~L~~ — CHALECOS: ~~F~~ LUZ ~~U~~ FLORES ~~U~~ UHF ~~V~~ VHF

BOTE NEUMATICO: ~~B~~ NUMERO — CAPACIDAD — CUBIERTA — COLOR

COLOR & MARCA DE AERONAVE
A/ **BLANCO CON ROJO**

~~N~~ OBSERVACIONES

PILOTO AL MANDO
C/ **KEVIN D. DONALDSON**

PREPARADO POR	FECHA DE VUELO	NOTAS ADICIONALES
Kevin D. Donaldson	**19-04-01**	